(29,995)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 685

JOHN F. STEELE, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 28, 1928

CITATION

United States of America to William Hayward, United States Attorney for the Southern District of New York, Greeting:

Whereas, John F. Steele has lately appealed to the Supreme Court of the United States from an order, judgment or decree lately rendered in the District Court of the United States, for the Southern District of New York, by which his application to review the decision and findings of United States Commissioner Samuel M. Hitchcock, was denied, and by which his application to set aside the search warrant above described was denied, and the said John F. Steele has filed security required by law; you are, therefore, hereby cited to appear before the said Supreme Court at the City of Washington, on the 12th day of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand in the City of New York in the Second Circuit, this 14th day of November, 1923.

Augustus N. Hand, Judge of the United States District Court for the Southern District of New York.

[fol. 2] **DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK**

In the Matter of the Application of JOHN F. STEELE to Vacate a Search Warrant Issued by Hon. Samuel M. Hitchcock, United States Commissioner, on the 6th Day of December, 1922, Directing One Isidor Einstein to Search Premises 611 W. 46th Street, Borough of Manhattan, City and Southern District of New York

PETITION FOR AND ORDER ALLOWING APPEAL

John F. Steele, the applicant above named, conceiving himself aggrieved by the order, judgment or decree made and entered on the 9th day of November, 1923, in the above entitled proceeding, does hereby appeal from said order, judgment or decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order, judgment or decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, N. Y., November 14, 1923.

Celler & Kraushaar, Attorneys for Applicant, Office & P. O. Address 51 Chambers Street, Borough of Manhattan, City of New York.

The foregoing claim of appeal is allowed.

Dated, November 14th, 1923.

Augustus N. Hand, United States District Judge.

[fol. 3] DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENTS OF ERROR

John F. Steele prays an appeal from the final order, judgment or decree of this Court made and entered herein on November 9th, 1923 to the Supreme Court of the United States and assigns for error,

1. That the search warrant above described should have been vacated and quashed, and the property seized thereunder returned to him on the grounds,

(a) Because the said search warrant was issued by the said United States Commissioner in violation of the fourth amendment to the Constitution of the United States, in that the same was not issued upon probable cause supported by oath or affirmation and naming the person and particularly describing the property to be seized or the place to be searched.

(b) Because the said search or seizure conducted under the said warrant aforesaid was unreasonable.

(c) Because the said search warrant was issued in violation of Article 5 of the amendments to the Constitution of the United States, in that the same deprived the claimant of his property without due process of law, and on the further ground that by virtue thereof the claimant was compelled to be a witness against himself in a criminal [fol. 4] proceeding.

(d) Because the said warrant was issued based upon conjecture, surmise and suspicion, and not upon reasonable or probable cause, in violation of the aforesaid provisions of the Constitution.

(e) Because the said search warrant limited the officer to whom it was directed to the search of premises 611 W. 46th Street, Borough of Manhattan, City and Southern District of New York, and that the officer, in making the search in violation to such Constitutional guarantee, searched other and different premises, to wit, premises 609 W. 46th Street, in said Borough of Manhattan, City and Southern District of New York.

Wherefore, the said John F. Steele prays that the final order, judgment or decree of the said District Court be reversed.

Dated, New York, N. Y., November 14, 1923.

Celler & Kraushaar, Attorneys for John F. Steele, Office & P. O. Address 51 Chambers Street, Borough of Manhattan, City of New York.

[fol. 5] At a Stated Term of the United States District Court Held in and for the Southern District of New York, in the Post Office Building, in the Borough of Manhattan, City of New York, this 9th day of November, 1923

[Title omitted]

JUDGMENT

The petition of John F. Steele, above named, having been presented, praying that the proceedings of United States Commissioner Samuel M. Hitchcock be reviewed, and that an order vacating and setting aside the search warrant above described and directing the return to the applicant, John F. Steele, of the property seized by virtue of and under color of said warrant, and said application having come on to be heard before said Court on the 5th day of November, 1923.

Now, upon reading and filing the notice of application dated October 30, 1923, the petition of Meyer Kraushaar, verified October 30, 1923, the affidavit of Isidor Einstein, verified December 6, 1922, upon which the search warrant above described was issued, the search warrant signed by Samuel M. Hitchcock, Esq., United States Commissioner, bearing date December 6, 1922, the return made by said Isidor Einstein, endorsed on the back of said warrant, the affidavit of John F. Steele, verified December 21, 1922, to controvert said [fol. 6] warrant, the depositions of Isidor Einstein, Moe W. Smith and John F. Steele, taken before said Commissioner, the exhibits offered in connection therewith, and the decision and findings of the said Commissioner refusing to quash said search warrant and refusing to direct the restoration to the claimant of the property seized thereunder, all of which are submitted in support of said application, and after hearing Meyer Kraushaar, Esq., of counsel for said claimant, John F. Steele, and Elmer H. Lemon, Esq., Assistant United States Attorney, in opposition thereto and due deliberation having been had thereon, in accordance with the provisions of Section 16 of an Act of Congress of June 15, 1917, Chapter 30, Article II, of an Act to Punish Acts of Interference with Foreign Relations, etc., it is

Ordered, adjudged and decreed, that the application to vacate said search warrant and to restore the property to the claimant be denied on the ground that the property taken is the same as that described in the warrant, and that there is probable cause for believing the existence of ground on which the warrant was issued, and it is further

Ordered, adjudged and decreed, that the said property remain in the custody of the officer by whom the same was seized, or to be otherwise disposed of according to law.

Enter.

Francis A. Winslow, U. S. D. J.

[fol. 7] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION

Upon the annexed petition of Meyer Kraushaar, verified the 30th day of October, 1923, and upon the affidavit of Isidor Einstein, verified December 6, 1922, the search warrant issued by the Hon. Samuel M. Hitchcock, dated December 6, 1922, requiring Isidor Einstein, general Prohibition Agent, to search premises 611 W. 46th Street, in the Borough of Manhattan, City and Southern District of New York, and the return made by said Isidor Einstein, the depositions taken before the said United States Commissioner, Samuel M. Hitchcock of Isidor Einstein, Moe W. Smith and John F. Steele, upon the decision made by the said United States Commissioner and the affidavit of John F. Steele verified December 21, 1922, and upon all other proceedings had herein, the undersigned will move this Court at a Stated Term thereof, to be held in Room 331 in the Post Office Building in the Borough of Manhattan, City and Southern District of New York, on the 5th day of November, 1923 at 10:30 o'clock in the -noon, or as soon thereafter as counsel can be heard, for an order vacating and setting aside the search warrant above described, and directing the return to the said John F. Steele, [fol. 8] the claimant above named, of the property seized under said search warrant, and for such other and further order in the premises as may be just.

Dated, New York, N. Y. Oct. 30, 1923.

Meyer Kraushaar, Attorney for John F. Steele, Office & P. O. Address 51 Chambers Street, Borough of Manhattan, City of New York. To Hon. William Hayward, United States Attorney for the Southern District of New York; Hon. Samuel M. Hitchcock, United States Commissioner, Post Office Building, New York City.

[fol. 9] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR ORDER VACATING SEARCH WARRANT

To the Honorable Judges of the United States District Court for the Southern District of New York:

The petition of Meyer Kraushaar respectfully shows to this Court:

1. That he is a member of the Bar of this Court, and is the attorney for John F. Steele, above named.

2. That on the 6th day of December, 1922, Samuel M. Hitchcock, Esq., United States Commissioner, upon an affidavit made by one Isidor Einstein, verified December 6, 1922, issued a search warrant under the provisions of an Act of Congress of June 15, 1917, Chapter 30, Article 11, which said search warrant directed the said Isidor Einstein to search for intoxicating liquor containing more than one-half of one per cent of alcohol by volume, fitted for beverage use, in the premises 611 W. 46th Street, Borough of Manhattan, City and Southern District of New York and if found, to seize the same.

3. That the said Isidor Einstein, acting for and by virtue of and under color of said warrant, did enter premises 609 W. 46th Street, [fol. 10] Borough of Manhattan, City and Southern District of New York, as well as the premises described in said warrant, and did seize thereunder a large quantity of property belonging to said John F. Steele, and the said John F. Steele did, thereupon, in accordance with the provisions of Sections 15 and 16 of said Act of Congress, controvert and move to vacate the said warrant before said Commissioner.

4. The said Commissioner did thereupon take depositions in pursuance of Sections 15 and 16 of said Act and did refuse to vacate and quash the said warrant. That the said John F. Steeele feels aggrieved as the result of said *said* decision and desires to have the same reviewed by this Court.

5. That the grounds upon which said search warrant should be vacated and quashed and the property seized returned to the said claimant, are as follows:

(a) Because the warrant issued by said United States Commissioner was issued in violation of the fourth amendment to the Constitution of the United States, in that the same was not issued upon probable cause supported by oath or affirmation, and particularly describing the place to be searched or the person or things to be seized.

(b) Because the said search and seizure conducted under the warrant aforesaid was unreasonable.

(c) Because the said search warrant was issued in violation of Article 5 of the amendments to the Constitution of the United States in that the same deprived the claimant of his property without due process of law, and on the further ground that by virtue thereof the claimant was compelled to be a witness against himself in a criminal proceeding.

[fol. 11] (d) Because the said warrant was issued based upon conjecture, surmise and suspicion, and not upon reasonable or probable cause, in violation of the aforesaid provisions of the Constitution.

(e) That the said search warrant limited the officer to whom it was directed to the search of premises 611 W. 46th Street, Borough of Manhattan, City and Southern District of New York, and that

the officer, in making the search in violation to such Constitutional guarantee, searched other and different premises, to wit, premises 609 W. 46th Street, in said Borough of Manhattan, City and Southern District of New York.

6. That as proof of the allegations herein contained, your petitioner will submit upon the hearing herein the affidavit of said Isidor Einstein verified the 6th day of December, 1922, the said search warrant issued by said Commissioner bearing date the 6th day of December, 1922, the affidavit of John F. Steele, verified December 21, 1922, the return made by the said Isidor Einstein showing the seizure of 150 cases whiskey, 92 bags whiskey, one 5 gallon can of alcohol, six 5-gallon jugs whiskey, 33 cases of gin, 102 quarts of whiskey, two 50-gallon barrels of whiskey, and one corking machine, and the depositions taken before the said United States Commissioner of Isidor Einstein, Moe W. Smith and John F. Steele, and the exhibits and other documents offered before the said United States Commissioner.

Wherefore, your petitioner prays that an order be made setting aside and vacating the said search warrant and directing the return to the claimant of the property above described.

Dated, New York, N. Y. October 30, 1923.

Meyer Kraushaar, Petitioner.

[fol. 12] Jurat showing the foregoing was duly sworn to by Meyer Kraushaar omitted in printing.

[fol. 13] Approved: John M. Cashin, Special United States Attorney. Before Hon. Samuel M. Hitchcock, United States Commissioner for the Southern District of New York.

[Title omitted]

VIOLATION OF THE NATIONAL PROHIBITION ACT

AFFIDAVIT FOR SEARCH WARRANT

SOUTHERN DISTRICT OF NEW YORK, ss:

Isidor Einstein, being duly sworn, deposes and says: I am a General Prohibition Agent assigned to duty in the State of New York. On December 6, 1922, at about 10 o'clock A. M. accompanied by Agent Moe W. Smith, I was standing in front of the garage located in the building at 611 West 46th Street, Borough of Manhattan, City and Southern District of New York. This building is used for business purposes only. I saw a small truck driven into the entrance of the garage and I saw the driver unload from the end of the truck a

number of cases stencilled whiskey. They were the size and appearance of whiskey cases and I believe that they contained whiskey.

A search of the records of the Federal Prohibition Director's office fails to disclose any permit for the manufacture, sale or possession of intoxicating liquors at the premises above referred to.

The said premises are within the Southern District of New York and upon information and belief, have thereon a quantity of intoxi-
[fol. 14] cating liquor containing more than one-half of one per cent of alcohol by volume, and fit for use for beverage purposes, which is used, has been used and is intended for use in violation of the Statute of the United States, to wit, the National Prohibition Act.

This affidavit is made to procure a search warrant, to search said building at the above address, any building or rooms connected or used in connection with said garage, the basement or sub-cellar beneath the same, and to seize all intoxicating liquors found therein.

Isidor Einstein.

Sworn to before me this 6th day of December, 1922. Saml. M. Hitchcock, U. S. Commissioner, Southern District of New York.

[fol. 15] SEARCH WARRANT

The President of the United States of America to Isidor Einstein, General Prohibition Agent:

Whereas, It appears from the affidavit of said Isidor Einstein that certain intoxicating liquor containing more than ½ of 1% of alcohol by volume and fit for use for beverage purposes is unlawfully held and possessed in a certain garage located in the four-story building at 611 West 46th Street, Borough of Manhattan, City, and Southern District of New York, said building being used for business purposes only—and in any safe or desk, store room, container, receptacle, basement or sub-cellar, building, room or rooms connected or used in connection with said garage; and that said liquor is used and is intended for use and has been used in violation of Title II of the National Prohibition Act in that said liquor was and is wilfully, knowingly and unlawfully held in said premises,

Now, therefore, you are hereby commanded in the name of the President of the United States, in the day time only, to enter the said premises, and then and there to search diligently for said liquor, and if the same or any part thereof shall be found on said premises, then you are hereby authorized and commanded to seize and secure the same and to make a return of your doings to the undersigned within ten days from the date hereof.

You are likewise commanded in the event you seize or take said liquor under the warrant to give a copy of this warrant, together with a receipt for the liquor taken, (specifying it in detail) to the person from whom it is taken by you, or in whose possession it is found, or in the absence of any person to leave a copy of this warrant, with the receipt as aforesaid, in the place where said liquor is found.

Immediately upon execution of this warrant you are commanded further to forthwith return the warrant to the undersigned, and to [fol. 16] deliver to him a written inventory of the liquor taken, duly made and verified by you.

Given under my hand and seal this 6th day of December, 1922.

Saml. M. Hitchcock, United States Commissioner for the Southern District of New York.

[fol. 17] (Indorsement in pencil on the warrant:) New York, Dec. 6, 1922. 150 cases whiskey, 92 bags of whiskey, 1 5 gallon can of alcohol, 6 5 gallon jugs of whiskey, 33 cases of gin, 102 quarts whiskey, 2 50 gallon barrels of whiskey, 1 corking machine. Isidor Einstein, General Agents.

[fol. 18] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF JOHN F. STEELE

CITY AND COUNTY OF NEW YORK, ss:

John F. Steele being duly sworn deposes and says: That he resides at No. 609 West 46th Street, in the Boro of Manhattan, City, State and Southern District of New York.

That I live on the 3rd floor of said premises. That this affidavit is made to vacate the search warrant issued on the 6th day of December, 1922, by Hon. Samuel M. Hitchcock, U. S. Commissioner for the Southern District of New York, and by virtue of said search warrant Isidor Einstein and Moe Smith seized certain intoxicating liquors. That the search warrant specifically says that the goods seized are located in a certain garage located in the four story building of premises 611 West 46th Street, City, State and Southern District of New York.

It is submitted that practically all of the intoxicating liquors were seized in premises known as and by the street No. 609 West 46th Street, in the Boro of Manhattan, City, State and Southern District of New York.

That 609 West 46th Street is a separate and distinct building from 611 West 46th Street. That both buildings which are made of brick, are occupied as a general storage, with the exception of the [fol. 19] ground floor, which is a garage, and which said buildings are four stories in height. That there is a common party wall between the two buildings.

Upon the hearing a photograph will be produced showing the separate and distinct character of both buildings on the inside as well as the outside.

That there are two separate and distinct entrances to the buildings. That there is an elevator in premises known as and by the

street No. 609 West 46th Street, but there is no elevator in the premises known as and by the street No. 611 West 46th Street. That there is, however, a stairway or hatchway in premises known as and by the street No. 611 West 46th Street; that there is also a stairway in premises known as 609 West 46th Street.

That the following articles were seized by the said agents:

150 cases Whiskey.
92 Bags Whiskey.
1 Five gallon can alcohol.
6 Five gallon jugs of whiskey.
33 Cases gin.
102 Quarts whiskey.
2 Fifty Gallon barrels of whiskey.
1 Corking machine.

That the seizure was made on December 6th, 1922.

It is submitted that the 150 cases of whiskey, the 92 bags of whiskey and the one five gallon can alcohol were seized on the third floor of premises 609 West 46th Street, in the premises adjoining the living quarters of your deponent, which living quarters your deponent shares with another man by the name of Oscar Smith, his wife, and child.

That the photographs will distinctly show the curtains on the outside windows where he is living, and which said quarters consist of [fol. 20] three rooms, in one of which rooms the said three items of 150 cases of whiskey, 92 bags of whiskey and one five gallon can of alcohol were located.

That the thirty-three cases of gin were seized on the second floor of premises 609 West 46th Street. That the goods seized in said building 609 West 46th Street, belong to your deponent, who now lays claim to some, and asks that the said property be restored to him in the place whence they were taken.

That your deponent has a legal right to said goods because they were in the premises wherein he has his dwelling. Furthermore the search warrant does not provide for a search of premises 609 West 46th Street.

That the 6 five gallon jugs of whiskey, 33 cases gine, 102 quarts whiskey, 2 fifty gallon barrels of whiskey and the corking machine do not belong to your deponent, and he makes no claim for the same, which said articles were located in the adjoining building 611 West 46th Street.

An observation of the photograph submitted distinctly shows the separate and distinct character of both buildings; also the separate entrances to each, and the photograph of the third floor of 609 West 46th Street clearly shows the living quarters in which your deponent lives, and the rooms wherein he has his personal belongings as well as with Mr. Smith, his wife and child.

It is impossible to gain access to the upper part of the premises 609 West 46th Street by going into the building 611 West 46th Street.

John F. Steele.

Sworn to before me this 21st day of December, 1922. Bertha Biener, Commissioner of Deeds, City of New York, Residing in Boro of Brooklyn.

[fol. 21] (Indorsement on foregoing affidavit of John F. Steele:) Petition denied. 8/29/23. Saml. M. Hitchcock, United States Commissioner, Southern District of New York.

[fol. 22] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Before Samuel M. Hitchcock, Esq., United States Commissioner

MINUTES OF HEARING BEFORE U. S. COMMISSIONER

New York, July 24, 1923.

Appearances: William Hayward, Esq., United States Attorney, for the Government; H. Sanford Cohen, Assistant United States Attorney, of Counsel; Celler & Kraushaar, Esqrs., Attorneys for Petitioner; Meyer Kraushaar, Esq., of Counsel.

[fol. 23] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Kraushaar: At the outset, Mr. Commissioner, allow me to state that this application is two-fold in character.

It is, first, to vacate and set aside the search warrant upon the ground that the affidavit upon which it was issued is entirely insufficient to comply with the provisions of the Espionage Law, and the search was clearly in violation of the Fourth Amendment to the Constitution of the United States.

In the event that the application is denied, the second ground is to controvert the search warrant, to show that the facts upon which it was obtained are false, that the description contained therein is mistaken, that the search was unlawfully made, in that the warrant called for a garage on certain premises and that the search was made in premises other than a garage.

On the first ground, I call the attention of the Commissioner to the affidavit upon which this search warrant was obtained. The affidavit was made by one Isidor Einstein, who is as familiar to your Honor as he is to other members of the Bar, and he says that on December 6, 1922, at about ten o'clock a. m., accompanied by agent Moe W. Smith, he was standing in front of a garage located in the [fol. 24] building at 611 West 46th Street, Manhattan, City of New York and Southern District of New York.

He says: "This building is used for business purposes only. I saw a small truck driven into the entrance of the garage, and I saw

the driver unload from the end of the truck a number of cases stencilled 'whiskey.' They were the size and appearance of whiskey cases, and I believe that they contained whiskey."

Now, in my judgment this affidavit is wholly insufficient to comply with the provisions of the law.

Mr. Cohen: Suppose you reserve all questions of law for the end of the case, because the Commissioner has already said that he is not going to set aside the warrant.

The Commissioner: I may not.

Mr. Kraushaar: I call your attention to the case of the United States against Casino, in 286 Federal Reporter 976, where Judge Learned Hand, in a case almost identical with the one at bar, vacated the search warrant. There the affidavit said, as here, that the prohibition officer saw a truck drive into the petitioner's place of business, and he believed that there was liquor therein. Upon that affidavit a search warrant was issued, and Judge Hand set aside the [fol. 25] warrant on the ground that this kind of proof was wholly insufficient.

The Commissioner: I recall that case very distinctly. It was a case which was taken up from me, and I read Judge Hand's opinion with a great deal of interest. The question of time there was one of the important elements in that decision, as I recall it, and I think there were a number of days elapsed——

Mr. Kraushaar: Two days had elapsed.

Mr. Einstein: Forty-eight hours.

The Commissioner: You mean in the Casino case?

Mr. Kraushaar: Yes, there was a lapse of two days' time.

Mr. Smith: It was on a Saturday, and the warrant was executed on Monday.

The Commissioner: In that case there was a certain amount of time which had elapsed——

Mr. Kraushaar: Yes, but I don't think, your Honor, that the case rested upon that basis alone.

The Commissioner: Oh, no, but he wrote a long opinion, and I recall it very well, because he and Judge Hough had disagreed in regard to some things, and are still in disagreement. It may be in the opinion itself, but Judge Hand at the time stated that he hoped there would be an appeal.

[fol. 26] Mr. Cohen: That is all.

The Commissioner: He told me that he hoped there would be an appeal before the higher court on the questions that he decided.

Mr. Kraushaar: If your Honor please, here in this case I fail to see the distinction. On the contrary, I think the Casino affidavit was much stronger than the one at bar. Here the witness says that he saw, in so many words, a number of cases being unloaded from a truck, but he does not say they were put into the garage.

Mr. Cohen: There is a substantial difference——

Mr. Kraushaar: Will you allow me to continue, please? I won't interrupt you, I promise you that. He says: "I saw a small truck driven into the entrance of the garage, and I saw the driver unload from the end of the truck a number of cases," which looked like whiskey and which were taken off the truck. He does not say that

the whiskey remained on the premises. He does not say that he saw the truck leave the premises without the whiskey cases. He doesn't know, but he says it looked to him like whiskey. There is no proof, no actual proof, that it was whiskey. It is entirely speculative on his part, and it seems to me that if search warrants can be obtained [fol. 27] upon such evidence as this, the effect of the prohibition inhibition, and the protection afforded to the citizens is effectually set at naught and is of no value at all; that it is clearly a violation—it is a clear and palpable violation of the citizen's constitutional rights.

The Commissioner: Section 5 of the Title 11 of the Act of June 13, 1917, provides that affidavits or depositions must set forth the facts tending to establish the grounds of the application for probable cause for believing that a violation exists. Now, I will have to say that I never have issued a search warrant except after careful examination of the affidavits and, as Mr. Cohen knows, I have from time to time sent back to the District Attorney various affidavits and have refused to issue warrants.

Now, this affidavit, to my mind, is quite within this provision of law, that it certainly tends to establish the grounds for the application and probable cause for believing that the violation exists.

Mr. Kraushaar: If you will allow me, Mr. Commissioner, I think you are quite as familiar with the authorities as I am, but I would like to refresh your memory a bit on some of the fundamental principles affecting this question. The courts have, from time to [fol. 28] time, set aside search warrants where the affidavits made upon information and belief did not sufficiently state the source of the grounds of belief or the source of the information was not stated.

The reason for that underlying rule was that even though the underlying affidavit did tend to prove that a crime was committed or that goods were in the possession of a man or on his premises for the purpose of violating the law, still mere information and belief was a mere conjecture. It was built on conjecture and nothing else and, for that reason, the source of the information and the grounds of belief must be stated.

And if it comes by reason of hearsay; if it is bases on information derived from third parties, the information of the third parties must be produced or a satisfactory explanation given as to why it can not be produced.

Now, it seems to me that that fundamental rule applies equally as well where the witness does not say or does not use the term "information and belief," but where he says "I saw something entering the premises which looked like a case of whiskey, and I believe it is whiskey." That is a mere suspicion, it is a mere conjecture.

[fol. 29] The Commissioner: Why, it was marked "whiskey."

Mr. Kraushaar: Well, a case marked "whiskey" can still enter a man's premises and not be whiskey, and it seems to me that before a search warrant can be issued, there must be a reasonable attempt made to exclude any other possible inference except that the box which was unloaded somewhere contained whiskey, and also that it was unloaded in the garage and remained in that garage, without any further evidence or any other evidence.

It seems to me that such an affidavit as this is clearly evasive of the provisions of the Espionage Law, as well as the constitutional requirements.

The Commissioner: Well, I shall deny your motion in that regard.

Mr. Kraushaar: To which I respectfully except.

(Informal discussion off the record.)

ISIDOR EINSTEIN was called as a witness on behalf of the Government and, being first duly sworn, testified as follows:

Direct examination by Mr. Cohen:

Q. Are you attached to the Treasury Department——

A. Yes.

Q. And assigned to the enforcement of the National Prohibition [fol. 30] Act?

A. Yes, sir.

Q. Are you assigned to the office of the Federal Chief for the State of New York?

A. Yes, sir.

Q. Division No. 2?

A. Yes, sir.

Q. Were you so assigned on the 6th day of December, 1922?

A. Yes, sir.

Q. On that day did you visit premises on West 46th Street?

A. Yes, sir.

Q. What was the address?

A. 609 West 46th Street.

Q. Is that in the City of New York?

A. Yes, sir.

Q. Give a description of the building. What kind of a buiding is it?

A. This is a large structure, a brick building, with the appearance of a garage.

Q. Were there any names on the building?

A. There was some names, but I didn't notice the name of it at that time.

Q. Were there any numbers on the building?

[fol. 31] A. Yes, sir.

Q. What numbers?

A. 609 and 611, two numbers.

Q. That is on West 46th Street?

A. Yes, sir.

Q. Who was with you at the time you went there?

A. Agent Moe W. Smith.

Q. Where were you standing in relation to this garage—was it a garage?

A. Yes, sir.

Q. Where were you standing?
A. Just facing the entrance, on the other side of the street, on the sidewalk.
Q. Well, while you were there, what did you observe?
A. I saw a little truck, with no name on it, just drive into the garage.
Q. Did you see this truck go into the garage?
A. I did.
Q. How far in?
A. At the extreme end.
Q. You mean at the entrance or way at the back?
A. At the extreme end, at the back of the garage.
Q. Yes?
A. And, when the little truck got in there, I stepped a few feet [fol. 32] further, nearer to the garage, so that I could observe what is doing.
Q. And what did you see?
A. I saw the tail board being opened by one man—a certain man which I don't know who he is—and a minute later somebody else stepped over, and I saw cases, a number of cases, being unloaded there, and they were loading them on the other wagon right at the end.
Q. How far away were you?
A. At that time I was——
Q. What distance would you say, in feet?
A. I should say at that time—that was the time I crossed the street there and walked by—I was just about—you mean from the garage?
Q. From where you saw this wagon being unloaded, to the point where you were standing; how many feet was that?
A. At that time I was at the sidewalk.
Q. How many feet away would you say it was?
A. From the garage?
Q. From the place where this was unloaded.
A. Oh, I would say——
Q. Can you tell us the distance?
A. I would say it was twenty-five or thirty feet—about.
Q. Now, what did you observe as to those cases you saw being unloaded?
[fol. 33] A. I saw them put them out at the extreme end, which I later found——

Mr. Kraushaar: No, never mind that.

Q. What did you observe as to those cases? What were they marked?
A. The cases was marked "whiskey."
Q. That you saw?
A. Yes, I saw them unloaded.
Q. Did you make a search of the Federal Prohibition Director's office?
A. Immediately thereafter, I went back to the Prohibition De-

partment and looked over the records, to see whether those premises had a permit, but we couldn't locate any.

Q. Is there a permit for the possession——

A. No, sir.

Q. (Continuing:) —or manufacture or sale of intoxicating liquor at those premises?

A. No, sir.

Mr. Kraushaar: I move to strike out the answer on the ground that this is not proper proof. I think the witness should be qualified——

The Commissioner: Please read the question.

(Question read.)

Mr. Cohen: That is in the affidavit and sworn to.

[fol. 34] Mr. Kraushaar: I submit that is not proper proof, that the witness has not shown any proper qualification to testify that there is not any permit. It is not proper evidence, and it is secondary evidence, anyhow.

The Commissioner: If he says there is none, you can cross examine him on that. Objection overruled.

Mr. Kraushaar: I respectfully except.

By Mr. Cohen:

Q. What kind of a building is it?

A. It is a brick structure, with the appearance of a garage.

Q. Do you know for what purpose it is used?

Mr. Kraushaar: I object to that unless the witness is allowed to testify, or can say he knew, at the time he made the affidavit, what purpose it was used for.

Mr Cohen: He was so sworn.

Mr. Kraushaar: Now, please don't put any words in his mouth.

The Commissioner: He has testified that it was used as a garage.

Mr. Cohen: Now, I want to offer proof from this witness, as part of the search warrant, just what was seized in those premises.

[fol. 35] By Mr. Cohen:

Q. You obtained a search warrant from Commissioner Hitchcock.

A. I then returned—I went to United States Commissioner Hitchcock for a search warrant.

Q. When you went there with a search warrant, did you see anyone there?

A. I did.

Q. Any person who is now present in court?

A. Later on, this person appeared (indicating), while the search went on. He was sent for.

Q. On whom did you serve a certified copy of the search warrant on?

A. On this man (indicating).

Mr. Kraushaar: Mr. Steele, you mean?
The Witness: Yes.

By Mr. Cohen:

Q. What did you seize?
A. I couldn't recollect, unless I saw the copy.

Mr. Kraushaar: And where did you seize it? That is important.

By Mr. Cohen:

Q. Where did you seize the liquors that you said you seized in your return (handing paper to witness).

[fol. 36] Mr. Kraushaar: That is not the return; that is my copy, but it is all right. Here is the original return (handing paper to counsel).

Mr. Mr. Cohen:

Q. There is your original (handing paper to witness).
A. 150 cases of whiskey——

(Informal discussion off the record.)

Q. When you came with the search warrant, to what part of the building did you go first?
A. To the same place where I saw the liquor being unloaded.
Q. That is, on the street floor?
A. Yes, sir.
Q. Did you find any liquor there?
A. I did not.
Q. Where did you go from there?
A. On the elevator, one flight up.
Q. Where is the elevator?
A. In the center of the garage.
Q. At the front or rear?
A. In the rear.

Mr. Kraushaar: Just a minute. May I, at this point, ask permission to interrogate the witness?
Mr. Cohen: Wait until I get through.
Mr. Kraushaar: All right.

Q. Then you went into the elevator, and you went up how many [fol. 37] floors?
A. Two floors.
Q. You went up two floors, or you went up one floor, which?
A. One—to the second floor.
Q. And you got out of the elevator?
A. Yes, sir.
Q. Where did you go after you got out of the elevator?
A. Right on the same floor.
Q. But where did you go, what part?

A. On the right side, on my right side as I entered.
Q. How did you get in?
A. I got up on the elevator.
Q. I mean where did you go?
A. When I got upon the elevator, I saw on my right hand side there, three men filling up bottles of whiskey and bagging whiskey.
Q. Now, the place you found that, was that enclosed in a little room?
A. That was enclosed in a little room, partitioned off on my right hand side.
Q. Was there a door to it?
A. There was a door to that.
Q. Was that door open?
A. It was.
[fol. 38] Q. Did you have to throw it down or break it in?
A. No, sir.
Q. Were those three men working there at the time?
A. They were filling up bottles at the time.
Q. Where else did you go on that floor, if anywhere?
A. In the rear, on the same side, to the front there were 33 cases of gin.
Q. When you say "on the same side," which side do you mean?
A. On the same floor I mean.
Q. On which side?
A. On the left hand side.
Q. Was this in an enclosed space?
A. It was in an enclosed place.
Q. Was that locked?
A. It was.
Q. Did you break the lock?
A. No, sir. A fellow by the name of Smith, which is the caretaker of the garage, opened it for us.
Q. Now, when you got through there, where did you go next?
A. On the floor above.
Q. How did you get there?
A. On the same elevator.
Q. Where did you go?
[fol. 39] A. To the front of the building, facing the street.
Q. And what did you find there?
A. 92 bags of whiskey, and 150 cases of whiskey.
Q. Where were those located? Were they enclosed in a room?
A. It was also in a closed room, on the same floor.
Q. How did you get in there?
A. The door was open.
Q. The door was open?
A. Yes.
Q. And you went in?
A. Yes, sir.
Q. Is that all that was seized in those premises? Is that all that was seized?

A. That is all that I can remember. 1 corking machine was seized also.

Q. Where was that seized?

A. On the floor above—below, I mean.

Q. One floor above the street?

A. Yes.

Q. Now, in describing the premises, how many entrances are there to this building on 46th Street? On the street floor what kind of entrances are there?

A. Large doors for the cars to drive in.

Q. Now, did you go up any stairs at all in the building?

[fol. 40] A. I did not.

Q. Did you investigate or look through that building to find any staircase?

A. I did.

Q. Where?

A. On the right hand side of the building there was some stairs, but it was partitioned of- or is, what you call it, dead—never been used.

Q. Did you find any other stairway?

A. I did.

Q. Where was that?

A. On the left hand side.

Q. Was that closed?

A. Which would indicate 611.

Q. Was that closed?

A. (No response.)

Q. Was that closed in any way?

A. It was not.

Q. Was that in use, or could be used?

A. Yes.

Mr. Kraushaar: Please don't prompt the witness, Mr. Smith.

Mr. Smith: I am not.

Q. Both of these stairways which you have just described are on

[fol. 41] 46th Street?

A. Yes, sir.

Q. And, between those two, are the entrances to the garage, as you have already described?

A. Yes, sir.

Q. Now, is there any partition separating this building on the street floor?

A. No, sir.

Q. Is there any partition on the second floor?

A. No, sir; outside of beams supporting the building.

Q. Can you have free access on the second floor to all parts of that floor?

A. Yes, sir.

Q. That is, after you get off the elevator?

A. Right at the elevator.

Q. Are there any partitions on the third floor?

A. No, sir, outside of the beams supporting the building.

Q. When you say "partitions," are there any separating partitions dividing the building on the ground floor in the front or rear?

A. No, sir. I could stand in the center and look around freely all over the building.

Q. Is there any part of the building which is enclosed for living purposes, that you discovered after you got there?

[fol. 42] A. On the third floor I found there a little cot, and this was questioned by me, "Who is there, who occupies it," at that time.

Q. Well, did you find out who occupied it?

A. I did.

Q. Who?

A. This man Smith which led us upstairs. He told us that he is the caretaker for Mr. Steele.

Q. Who does he live there with?

Mr. Kraushaar: I move to strike out that "he told us he is the caretaker," on the ground it is hearsay.

The Commissioner: Strike it out.

Q. Did you see any other persons about the building?

A. Yes, sir.

Q. Who?

A. I saw some woman up there.

Q. Where?

A. Right at the front.

Q. Do you know who that woman is, or were you told?

A. I do not.

Q. What did you do with this liquor that you seized?

A. I seized that liquor and took it to the Knickerbocker Warehouse, where Mr. Steele appeared later on. I served a copy of the search warrant on him. I asked Mr. Steele his place of business, [fol. 43] and Mr. Steele told me that he lives on 34th Street, I don't remember the number, and he told me that the garage and the liquor belongs to him.

Mr. Cohen: That is all.

Cross-examination by Mr. Kraushaar:

Q. Mr. Einstein, did you ever enter this building before you obtained a search warrant?

A. Never in my life.

Q. Before you obtained the search warrant, your sole familiarity with this building was its outward appearance?

A. Sir?

Q. I say, your only knowledge of this building was its outward appearance, at the time you obtained the search warrant?

A. From the outside, at the entrance of the garage, I saw some cars——

Mr. Kraushaar: I move to strike out the answer and ask that the witness be directed to answer the question.

The Commissioner: Read the question, please.

Q. (Question read.)
A. I don't understand that question.
Q. All you knew about this building, before you obtained the search warrant, is what you observed while standing outside of it?
[fol. 44] A. First, outside, yes, sir.
Q. Now, it is an easy matter to answer the questions——

Mr. Cohen: He said "Yes." He answered that it was.

By Mr. Kraushaar:

Q. Now, before you obtained the search warrant, you examined the outside of this building?
A. In what way?
Q. Did you look at the signs on the building?
A. I did.
Q. Is this a photograph of the building as it appeared to you on the day that you obtained the search warrant—the front part of the building?
A. I don't remember.
Q. Is that the best answer you can give, Mr. Einstein, that you cannot remember it?
A. That is the best answer I can give, in regards to this picture.

Mr. Kraushaar: I ask that the picture be marked for identification.
The Commissioner: I presume it will be conceded that it is a photograph of the building?
Mr. Kraushaar: Is that a photograph of the building, Mr. Cohen?
Mr. Cohen: The probabilities are that I will concede it is a pho-
[fol. 45] tograph, except for the snow on the ground and the crayon numbers on the doors.
Mr. Kraushaar: That is the only difference?
Mr. Cohen: Yes.
Mr. Kraushaar: That is correct. I offer it in evidence.
The Commissioner: It may be received.

(The photograph was received in evidence and marked "Petitioner's Exhibit No. 1, July 24, 1923.")

Mr. Cohen: Except that I don't know whether the curtains were there, the curtains on the windows on the second floor.

By Mr. Kraushaar:

Q. In the application for the search warrant, you described the building as a garage at No. 611 West 46th Street, New York City?
A. Yes.
Q. Where did you get the number from?
A. I remembered it.
Q. In other words, you looked at the building to see what numbers were on it?
A. I certainly did.
Q. Didn't you also see the number 609 on the building?

A. I didn't look for the other number. This number was sufficient for me.

[fol. 46] Q. This number was sufficient for you?

A. It was sufficient for me, for the building.

Q. Now, I call your attention, Mr. Einstein, to the fact that on this building there are two large entrances; do you observe that?

A. I do.

Q. Did you observe that at the time you made your application for the search warrant?

A. I did.

Q. Now, into which of the entrances did this vehicle go that you have described?

Mr. Cohen: You mean automobile?

Mr. Kraushaar: I said "vehicle." If he doesn't understand that term, I will explain it.

A. 611.

Q. You saw the vehicle enter the premises at 611?

A. Yes.

Q. Now, did you at that time realize that this building was two separate buildings?

A. I did not. I could only see one.

Q. You saw the number 609, didn't you?

A. I didn't take notice of the other numbers; just the numbers that it was necessary to take.

Q. Now, Mr. Einstein, you swore in your affidavit, didn't you, [fol. 47] that this building was used solely for business purposes?

A. I did.

Q. That was not true, was it?

A. That was.

Q. Well, as a matter of fact, you did find Mr. Smith living upstairs, didn't you?

A. No, I didn't find Mr. Smith living upstairs. I did not so testify.

Q. Didn't you testify that you found a number of women in the building?

A. I found a drunken woman up there, but I didn't find her living in the building.

Mr. Kraushaar: I move to strike that out.

The Commissioner: Strike out the word "drunken."

Q. Did you see a woman there?

A. I did see a woman.

Q. Didn't you find any beds in the building?

A. I saw a cot.

Q. How many cots?

A. One.

Q. Did you see a kitchen in the building?

A. No, sir.

Q. Did you go into the room where this cot was?

A. I did.

Q. Didn't you see any kitchen utensils there?

[fol. 48] A. I didn't pay no attention.

Q. Didn't you see a table there and a place to sit down?

A. I did notice a little table, yes.

Q. Didn't you see any plates or spoons or anything like that?

A. I was looking for whiskey, I wasn't looking for spoons.

Q. I see. That did not make any impression on your mind, the cot that was there?

A. It did not.

Q. Now, how came you, Mr. Einstein, to swear that this building was used solely for business purposes, without having entered the building to see what the building actually was used for?

A. Well, my answer is that I saw two automobiles all at once being fixed, at the time when I was watching the whiskey being unloaded, and I looked at the building and it didn't look as *it* anybody would live there; it looked just like an old structure, like a garage, and my judgment was that no man would live there, that nobody would live there, and nobody did live there, and——

Mr. Kraushaar: Wait a minute. I move to strike that out.

The Witness: That is my answer.

Q. In other words, when you looked at the building you assumed [fol. 49] that it was a building which was used purely for business purposes, but you had no knowledge of your own on the subject at the time you made this application for the search warrant?

Mr. Cohen: That is objected to.

The Commissioner: He may answer.

Mr. Cohen: He says "You assumed," and from that assumption——

The Commissioner: Please read the question.

(Question read.)

The Commissioner: He may answer.

The Witness: It so appeared to me, from the appearance of the building.

Q. But you did not actually know, did you?

A. I was never in the building before in my life.

Q. Now, did you observe a sign on this building at that time, reading as follows: "Indian Head Auto Truck Service, Indian Head Storage Warehouse?" Did you see that sign on the building?

A. I didn't take notice of that.

Q. You didn't notice that at all?

A. I did not.

Q. But you did take notice of the fact that there were signs on the building?

A. Numbers. I was looking for the number.

[fol. 50] Q. Didn't you testify on your direct examination, in answer to a question asked of you by Mr. Cohen, that you did see signs on the building, but that you did not remember exactly what they were?

A. I say I didn't remember of any signs. I didn't read them signs.

Q. Do you mean to testify that, when you were asked that question by Mr. Cohen, you meant to testify that you did not remember whether there were signs there or not, or that there were signs, but that you did not remember what they were?

A. I didn't pay no attention to any signs, outside of the number of the building, which I was interested in.

Q. How many search warrants have you obtained since you have been a Federal Prohibition Agent?

A. Oh, maybe 1,500.

Q. And you have learned, haven't you, in your experience, that there is such a thing as a constitutional provision against wrongful searches and seizures?

A. I have.

Q. And you understand, do you not, Mr. Einstein, that it is a serious thing to obtain a search warrant against a citizen?

A. Not when the evidence is there.

Q. Excuse me, but you understand, don't you, Mr Einstein that [fol. 51] it is a serious matter to obtain a search warrant—serious against a citizen?

A. Not when the evidence is there.

Mr. Kraushaar: May I ask, Mr. Commissioner, that the witness be directed to answer that question?

Mr. Smith: I think that is an answer, Mr. Commissioner.

The Commissioner: Wait a minute, you are not the counsel. Of course, you can insist upon an answer to the question, but I don't see how that is very material.

Mr. Kraushaar: It goes to the credibility of the witness, and I want to show that the witness knows the importance of obtaining a search warrant, and, if he did so in the manner he testified, he did so recklessly and without the proper basis——

The Commissioner: Of course I do not want to limit you in any way in your cross examination, but I don't see the importance of that.

Read the question, please.

(Question read.)

The Commissioner: He may answer that.

The Witness: My answer is that it is not serious at all, if I see a violation and the evidence is there. It is not serious at all; that is my duty.

[fol. 52] By Mr. Kraushaar:

Q. In other words, if you have the evidence and you know of a violation——

A. It is my duty to get a search warrant and seize the liquor.

By the Commissioner:

Q. I don't think you understand the question.

A. I do not, Mr. Commissioner.

Q. His intention is to ask you whether the taking out of a search warrant is not a serious matter.

A. Taking out a search warrant?

Q. Yes. Whether an application for a search warrant is not a serious matter.

A. My answer is, Mr. Commissioner, that I don't consider it serious if I see a violation. It is my duty, if I see a violation.

Q. I am not asking you that, but the question is whether the taking out of a search warrant is not a serious matter.

Mr. Kraushaar: Serious, perhaps, to the defendant or a person from whom property is taken.

A. My answer is that if I see a violation, I don't consider it serious to come and give my evidence here before the Commissioner and a get a warrant.

By Mr. Kraushaar:

[fol. 53] Q. In other words, the rights of the individual citizen, as far as the Constitution mean nothing, if you think you see a violation of the law being committed?

A. If the law is violated, it is my duty to go and get a search warrant and make a seizure.

Q. Now, how long have you been a resident of the City of New York?

A. Oh, for nine years.

Q. You are familiar, are you not, with the Tenement House laws?

A. I am not.

Q. You know, do you not, that where a building is used for dwelling purposes and contains more than three dwellings, that the law requires fire escapes to be on the property?

A. I am not acquainted with the Fire Department rules.

Q. You don't know anything about that?

A. No, I do not.

Q. You know, do you not, that a warehouse does not require fire escapes?

A. I don't know anything about those laws.

Q. I show you this photograph again and ask you to observe whether or not there are fire escapes on this building.

A. I don't remember whether I saw them at that time or not.

[fol. 54] Q. You didn't observe that proposition?

A. I answered that question before.

Q. That is the best answer you can make?

A. I said I didn't see any fire escapes.

Q. Now, did you observe whether there were any curtains on the second floor, at that time?

A. I didn't observe them either.

Q. But you do say that you saw a truck enter this place and, the ground floor being used as a garage, you assumed that the whole building was used for garage purposes?

A. I did not so testify.

Q. Did you assume that the whole building was used for garage purposes?

A. I testified a while ago that after I saw the liquor being unloaded, I looked the building over and it appeared to me to be a garage, not a private dwelling—the appearance—and I so testified.

Q. Didn't it appear to you that the first, second and third stories might have been used for warehouse purposes?

A. If it was used for warehouse purposes, the whiskey was illegally held there, anyway.

Mr. Kraushaar: I move to strike the answer out as not responsive.

The Commissioner: Strike it out.

[fol. 55] Mr. Kraushaar: Will you please read the question?

Q. (Question read).

A. It may have been used for a warehouse, and maybe not.

Q. And yet you described the entire premises as a garage at 611 West 46th Street?

A. As I said, it had the appearance of a garage. I saw machines up there.

Q. Well, now, Mr. Einstein, if you had gotten a search warrant to search a building or a tenement house at 611 West 46th Street, and that tenement house contained six or seven different apartments with various occupants in that house, would you search each and every one of those apartments?

A. I would not search a private house, but in a garage where the whole building——

Q. Let me ask you this question: If you got a search warrant, Mr. Einstein, against a garage at 611 West 46th Street, and the lower portion of the premises were used as a garage, while the upper parts were rented out to various owners, rented out to different people and used for different purposes, would you search the upper floors of that building, the upper parts of the building?

A. I don't think I have to answer that question. Let the Commissioner say.

[fol. 56] Mr. Smith: He don't know what he would do in any other place.

The Commissioner: Let me hear that question again.

(Question read.)

The Commissioner: I think you are asking a hypothetical question, Mr. Kraushaar.

Mr. Kraushaar: Very good, I will withdraw it.

The Commissioner: We are concerned solely with what happened in this case.

By Mr. Kraushaar:

Q. Now, as a matter of fact, Mr. Einstein, the first floor of this building was not used as a garage, was it—the floor above the ground floor?

A. It was—the first floor, is that what you mean?
Q. The ground floor of the garage?
A. It was.
Q. And the second floor, was that used as a garage?
A. I didn't find any automobiles up there, I found whiskey.
Q. Did you find anything up there—anything like automobiles on the first floor?
A. I found no machines.
Q. You mean, by "machines," automobiles?
A. Automobiles.
[fol. 57] Q. Outside of the whiskey, what did you find on the first floor?
A. I didn't see any there.
Q. The first floor, as a matter of fact, was used as a warehouse, wasn't it?
A. No, sir.
Q. Wasn't it used for the storage of goods?
A. I couldn't see anything.
Q. In other words, it was entirely empty at that time?
A. It wasn't entirely empty, no, sir.
Q. Now, this elevator that you saw there on the premises on the day you made your search, was that the kind of an elevator which is used in a garage?
A. It is an elevator, but I don't know if it was the kind of an elevator used in a garage.
Q. Well, was that elevator big enough to carry a machine going upstairs?
A. Why——
Q. By "machine" I mean a motor vehicle.
A. A machine could get on.
Q. How big a machine could get on that elevator?
A. I wouldn't want to say.
Q. You didn't see any machines going upstairs, did you?
A. What I saw was the whiskey.

Mr. Kraushaar: I move to strike out "what I saw was the [fol. 58] whiskey."
The Commissioner: Strike it out.

By Mr. Kraushaar:

Q. Didn't you see any barrels on the first floor?
A. What do you call the first floor? You mean the ground floor.
Q. No, the floor above the ground floor.
A. Well, that is the second floor.
Q. All right, we will call it the second floor.
A. Yes.
Q. Barrels containing whiskey?
A. Yes.
Q. Did you seize any barrels containing whiskey?
A. Yes, sir.
Q. Did you see any other barrels, outside of the whiskey barrels?

A. I don't remember any other barrels. I just remember what I took.

Q. I show you this photograph and ask you whether that is a photograph of the second floor?

A. I don't think so.

Q. You don't think so?

A. No, sir.

Mr. Kraushaar: I ask that it be marked for identification.

[fol. 59] (The photograph was thereupon marked Petitioner's Exhibit No. 2, for indentification, July 24, 1923.)

By Mr. Kraushaar:

Q. Now, when you testified on your direct examination that when you were in the garage, or when you looked into the garage, you could see every part of the building, you did not mean exactly that, did you?

A. I testified, if I recall, that I could stand——

Q. You mean on the second floor?

A. No, that you could stand in the garage on the first floor and that you could see every other part of the building.

Q. You mean the floor above?

A. Yes.

Q. The second floor?

A. Getting off the elevator—that is the only entrance we used—I could look through the whole building, yes sir, with the exception of a lot of pillars supporting the building.

By the Commissioner:

Q. Do you mean the whole building or through that floor?

A. Through the whole floor, through the entire building outside of——

Q. On that floor?

[fol. 60] A. On that floor.

Q. You could not see through the ceiling, of course?

A. No sir, you could not.

Q. You could see around that floor?

A. Yes, sir.

By Mr. Kraushaar:

Q. Now, you say that there was no dividing partition anywhere on those upper floors of the building?

The Commissioner: He did not say that.

Q. No. Were there any dividing partitions?

A. Why, at the extreme end, probably at the corner, there were certain little rooms, which you call, partitioned off—the middle part of the building, but you could look through, all over.

Q. Right through the middle of the building didn't there run cross beams which were supported by pillars?

A. Yes.

Q. And weren't those cross beams partitioned off by means of a partition?

A. They were not.

Q. I show you this photograph and ask you whether that is not a photograph of one of the upper floors of that building?

A. What floor do you mean?

Q. The third floor.

[fol. 61] A. The third floor? It didn't appear to me to be in the same condition as it is now.

Q. Well, is that substantially a photograph of the third floor?

A. I say it may be, and it may not be, but it doesn't look to me like it looked.

Q. Is your memory good, Mr. Einstein?

A. It is pretty fair.

Mr. Kraushaar: All right, I will offer that photograph in evidence.

(Photograph received in evidence and marked Petitioner's Exhibit No. 3, July 24, 1923.)

By Mr. Kraushaar:

Q. I show you another photograph, Mr. Einstein, and I ask you whether or not that is a photograph of part of the third floor of that building?

A. I cannot recall that.

Mr. Kraushaar: I ask to have that marked for identification.

(Photograph was thereupon marked Petitioner's Exhibit No. 4 for identification, July 24, 1923.)

By Mr. Kraushaar:

Q. I show you this photograph, Mr. Einstein, and ask you whether that is not a photograph of part of the second floor of that building?

[fol. 62] A. It didn't appear to me in that condition.

Q. What do you mean by not appearing to you in that condition?

A. I mean it didn't look that way when I was there, that is what I mean.

Q. Well now, let me ask you this: This portion which I point my finger at now on that photograph, is the elevator, isn't it?

A. I think it is, but I wouldn't be sure. It looks like it.

Q. And isn't that a wall (indicating) which divides off the two buildings outside of the elevator?

A. There was no wall at all at the time, I could look through the whole building.

Q. I see.

Mr. Kraushaar: I ask to have that marked for identification.

(Photograph was thereupon marked Petitioner's Exhibit No. 5 for identification, July 24, 1923.)

By Mr. Kraushaar:

Q. I will show you this photograph and ask you whether or not that is a photograph of the top floor of that building?

Mr. Kraushaar: Please don't prompt him, Mr. Smith. You will have your chance later.

Mr. Smith: I am not prompting him.

[fol. 63] A. I think it is. I recognize the woman.

Mr. Kraushaar: I offer that photograph in -dence.

(The photograph was received in evidence and marked Petitioner's Exhibit No. 6, July 24, 1923.)

By Mr. Kraushaar:

Q. Mr. Einstein, I call your attention to this photograph. This room here (indicating) where the lady stands, is the dwelling quarters, isn't it—the place where the people lived?

A. No, I testified here before that it was a room where I found the cot.

Q. That is where the people lived—Mr. Brown and his wife?

A. I didn't so testify.

Q. Isn't that the truth?

A. I didn't so testify.

Q. Well, isn't it the truth that they lived there?

A. I didn't testify that they lived there.

Q. Were there any living apartments there?

A. I don't know whether there is or not. I found a cot in a little room up there.

Q. Now, I show you these two photographs and ask you whether or not these are not the entrances to the so-called part of the garage part of that building?

[fol. 64] A. I don't remember any such markings as these (indicating).

Q. Outside of the markings—the markings being 609 and 611——

A. I don't remember those.

Q. Now, are these diagrams here which are in the possession of Mr. Smith—do they represent diagrams of the building at the time you visited it or entered it after the search warrant was obtained?

A. Yes, sir.

Q. These diagrams were made by Mr. Smith, your associate, after you went in there and searched the premises and found this liquor?

A. They were, yes.

Mr. Kraushaar: I offer these three papers in evidence.

(The papers were received in evidence and marked Petitioner's Exhibit No. 7, July 24, 1923.)

Mr. Kraushaar: That is all, no further cross examination.

I offer these two photographs in evidence, with the concession that the crayon figures 609 on one——

Mr. Cohen: With the correction that the crayon figures 609 on one of them were not there at the time of the visit, nor was the door open as shown on that same picture, but that the true photograph [fol. 65] would be as depicted on Exhibit No. 1.

Mr. Kraushaar: Will that be marked as an exhibit?

The Commissioner: That may be received in evidence.

(The photograph was received in evidence and marked Petitioner's Exhibit No. 8, July 24, 1923.)

Mr. Kraushaar: And the other photograph, which will be exhibit No. 9, is admitted by consent, with the exception that the figures 611 in crayon were not there at that time.

(The photograph was received in evidence and marked Petitioner's Exhibit No. 9, July 24, 1923.)

Mr. Kraushaar: Exhibits Nos. 2, 3 and 4 for identification, are they concededly a fair description of the interior of the building——

Mr. Smith: No, I have testified that they didn't look like that at the time.

Mr. Kraushaar: All right.

Moe Smith was called as a witness on behalf of the government and, being first duly sworn, testified as follows:

Mr. Cohen: It is conceded that Moe W. Smith will testify on direct examination to the same effect as the witness Isidor Einstein, with this exception:

[fol. 66] Direct examination by Mr. Cohen:

Q. Did you prepare these three papers?

Mr. Kraushaar: You are referring to Petitioner's Exhibit No. 7?

Mr. Cohen: Yes.

A. Yes, sir.

(Whereupon and adjournment was taken until to-morrow, Wednesday, July 25, 1923, at 2:00 P. M.

[fol. 67] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Application of JOHN F. STEELE to Vacate a Search Warrant and to Controvert the Same

Before Samuel M. Hitchcock, Esq., United States Commissioner

New York, July 25, 1923.

William Hayward, Esq., United States Attorney, for the Government; H. Sanford Cohen, Esq., Assistant United States Attorney, of Counsel.

Celler & Kraushaar, Esqrs., Attorneys for Petitioner; Meyer Kraushaar, Esq., of Counsel.

[fol. 68] MOE W. SMITH resumed the stand and testified as follows:

Direct examination (continued).

By Mr. Cohen:

Q. Mr. Smith, are you an employee and agent of the United States, attached to the Internal Revenue Department?

A. Yes.

Q. In the enforcement of the National Prohibition Act?

A. I am.

Q. Were you so engaged in the month of December, 1922?

A. I was.

Q. Did you, on December 6, 1922, visit the premises at 611 West 46th Street?

A. I did.

Q. In the City of New York?

A. Yes.

Q. Will you state what kind of a building that is?

A. It is a four story brick building, the ground floor occupied as a garage.

Q. That is what you first saw when you went there?

A. I did.

Q. How large a building is it? What frontage, if you know?

A. It covers two plots, two buildings—609 and 611 West 46th Street.

[fol. 69] Q. How many doors are there?

A. Four doors, all told; two smaller doors and two garage doors.

Q. The two garage doors are large enough for an automobile to enter?

A. They are.

Q. Now, the easterly door is——

A. No. 609.

Q. I will withdraw that. Can you enter the building by the

easterly door, the most easterly door, other than the two garage doors?

A. You cannot.

Q. Can you enter the building by the westerly door?

A. You can.

Q. What kind of an entrance is that?

A. About a four foot entrance to a stairway leading upstairs.

Q. Now, you were there on the outside of the building on that day at what time?

A. Sometime in the morning, about nine something. I don't know just what time it was, but it was early in the morning.

Q. And who was with you?

A. Agent Einstein.

Q. What did you or agent Einstein do, if you know?

[fol. 70] A. We stood practically opposite the building and we observed a car going into the automobile door entrance at 611. Agent Einstein then left me and went across the street. I walked east and agent Einstein then later met me. I stayed on the corner while agent Einstein went away, and watched this building.

Q. Did you observe anything?

A. I observed a small motor truck going into this here garage entrance and then I walked down towards Eleventh Avenue.

Q. What did you do after that?

A. I waited for Agent Einstein's return.

Q. Where were you standing?

A. On the corner of Eleventh Avenue and 46th Street. I walked across the street and back to the other side of Eleventh Avenue.

Q. Did you have the building under observation while you were there?

A. Well, not at all times.

Q. Then agent Einstein came back?

A. Yes.

Q. When did he come back?

A. I should judge in about an hour and a half or so.

Q. What did he have?

A. He had with him a search warrant for the building that we [fol. 71] observed.

Q. That search warrant was issued on the 6th day of December, 1922?

A. Yes.

Q. And these premises you say are in the City of New York?

A. They are.

Q. Then what did you do.

A. We entered the premises and we first met a man, which we later found out to be the caretaker. He said his name was Smith. We told him that we had a warrant, a search warrant to search the entire building. He at first objected and then we told him that we wanted to search the building. We searched the ground floor, which is an open floor covering the both plots, and we found nothing there at all. We then asked Smith to take us up on the first floor of the building. He had the key to the elevator, and he started the

elevator and took us up in the elevator to the first floor. This elevator is in the rear of the building, and we got off at the—the floor which is known as the second floor in this hearing—we got off and there is an opening which led into another part where there was three men who were filling bottles of amber colored fluid from filters and jugs. These men were in an enclosure. I should guess the enclosure was about twenty-five feet, partitioned off in this here building, and this was on the 611 side.

[fol. 72] Q. What did you find there?

A. We found a corking and whiskey bottling machine, one hundred and three quarts of whiskey, one corking machine, and two barrels of whisky, and six five gallon jugs of whiskey.

Q. What did you do then, where did you go?

A. From there we went back to the elevator side again, and we went to the front of the building which is known as 609, and we observed another room that was partitioned off in this here place, and it was locked. We asked this—that was in the front of the building, 609—we asked this man Smith about the keys for the lock. He then produced some keys and opened that closet, and then we found 33 cases of gin.

By the Commissioner:

Q. Before you get that far, what was there between where you were——

A. We entered this here place and there was an opening there, and we found nothing between this here opening where I had entered, but there was beams running across and some partitions in different parts of the building running from the rear to the front.

Q. Well, could you get access from where you were to those other places, without breaking down anything?

[fol. 73] A. We had free access at all times, without breaking anything down in the entire building.

By Mr. Cohen:

Q. Then where did you go?

A. From there we went to the next floor.

Q. You went by the elevator?

A. By the elevator. This same man Smith had taken us to the elevator and up to the next floor, and in the front of the building, which is the street side, we found another room that was partitioned off, in No. 609, which I called a store room, which had a door leading from—after getting off the elevator, a door that lead into this here room, and in that room we found ninety-two bags of whiskey and one hundred and fifty cases of whiskey. Those cases and bags bore no tax paid labels at all.

By the Commissioner:

Q. Now, on that floor were there any partitions separating——

A. There was in some part of it, not all of it. I believe in the part where we got off the elevator, there was some sort of a partition.

Q. Well, could you go all over the entire floor without breaking down anything?

A. Why, we never went through there at all. I didn't observe that, because we never went into that part of it at all. We stayed [fol. 74] in the 609 premises, because there was a gate there and they had that part locked so I didn't step in there at all.

Q. So you did not go into 611 at all?

A. I did not.

Q. Is there a living apartment there?

A, Well, there is a room there, which I asked this fellow Smith about, and he said that he had lived there as the watchman with his wife, and then I asked them how about the liquor. I said "How about this liquor, does it belong to you," and he said "It does not." I asked him, "who does it belong to," and he says, "it belongs to a different man"——

Mr. Kraushaar: I move to strike that out.

The Commissioner: I think that is hearsay.

Mr. Cohen: No, I think that is proper.

Q. Now, tell me about this living room. What was there in that room?

A. I observed just sort of a room that had a cot in it, some tables, and it had some other things there, and there was some men who were working downstairs, sitting up there at that time in that room.

Q. Was there a sink there at all?

A. I didn't observe that at all.

Q. Was there a bathroom?

[fol. 75] A. No, sir.

Q. Was there any arrangement for bathing in anyway or washing things?

A. I didn't observe it. It might have been there, but I didn't observe it.

Q. It was simply one room?

A. That is all I saw.

By Mr. Cohen:

Q. Now, this liquor which you took on that floor was not in this living room, was it?

A. It was not.

Q. It was in a different room?

A. Entirely different from these premises.

Q. And these partitions making up this living room, were they plastered partitions?

A. The partition was not.

Q. How was it partitioned off?

A. It was boarded.

Q. Were the boards close together or were they separated?

A. Well, they were close together.

Q. Was it done, from what you observed, so that it might have been regular carpenter work or was it done temporarily?

A. Well, it was sort of a rough job, just stuck up, as I recall it.

Mr. Cohen: That is all.

[fol. 76] Cross-examination by Mr. Kraushaar:

Q. Mr. Smith, Petitioner's Exhibit No. 1 is a fair description of the property—it is a photograph of the property as it looked at or about the time you made this seizure?

A. It is, with the exception, I believe, of the 609 and 611, which is crayoned on the bottom floor, and the first floor of the building.

Q. But the sign——

A. I don't remember the sign.

Q. The sign "Indian Head Auto Truck Service, Indian Head Storage Warehouse, 609 and 611," was there at that time?

A. I believe it was. I didn't take notice of that.

Q. But you did see two numbers on this building before the seizure was made, 609 and 611?

A. I don't remember whether I did or not. I didn't observe that, because agent Einstein took that, and I didn't bother with it, because I knew he was going for the warrant.

Q. You didn't see any whiskey on this wagon before it entered the garage?

A. I saw some boxes, but I didn't observe the stenciling, because I stayed directly opposite and then left for the corner after agent Einstein had crossed the street.

Q. And you did not see that there was anything stenciled on [fol. 77] the boxes at all?

A. I did not. As I said, I had left the spot where I was standing, after I saw the truck enter the garage and I went towards Eleventh Avenue.

Q. Did you know, before you obtained the search warrant, whether 611 or 609 were two separate buildings?

The Commissioner: He did not obtain the search warrant.

Q. Well, before the search warrant was obtained, did you know whether it was one building or two buildings?

A. I knew what the ground floor was.

Q. The ground floor was an open space?

A. One open space.

Q. Did you look into the building?

A. I didn't see, from where I was standing, but one ground floor, with no partitions.

Q. Did you see any automobiles downstairs?

A. I believe there was one or two, I don't know.

Q. Now, this building or these buildings have two separate entrances, haven't they?

A. In what respect?

Q. Well, 611 has this large garage entrance, hasn't it?

A. They both have large doors, either one.

Q. And you can get in through either one?

[fol. 78] A. Yes.

Q. Now, 611 has a door which would indicate a private entrance to a stairway, hasn't it?

A. It has, I came down——

Q. And 609 would seem to indicate that there was a stairway from the outside?

A. 609 had a door outside, which I saw, but that was nailed up.

Q. But you didn't know whether there was a stairway leading from that door or otherwise, the first time you inspected the building?

A. The first time I inspected the building was when I entered with the search warrant.

Q. I see, but from the outside it gave you the impression that there was a stairway leading up into the house?

A. I couldn't tell you. It might have led into the garage, for all I knew at that time.

[fol. 79] Q. Now, you made this drawing, Petitioner's Exhibit No. 7?

A. I did make that.

Q. Did you search the top floor of the building at all?

A. I did—if that is the top floor (indicating).

Q. Well, I call your attention to the fact that there are only three pieces of paper here, one reading "open space used for garage," one marked "second floor," and one marked "third floor."

A. If there is any floor above that, I don't know. I only made a drawing of the places that we entered.

Q. You don't know what is on the top floor?

A. I don't know whether there is a top floor or not. There may be, I don't know.

Q. I show you a photograph and call your attention to the fact that there are four stories to the building, the ground floor and three additional stories.

A. This is as high as I went, where the photograph indicates these curtains.

Q. Do you know whether those curtains were there at the time you made your inspection of the building, the first time?

A. They were not.

Q. That is, you believe they were not?

A. Positive.

[fol. 80] Q. Now, you saw, did you not, the part of the building in which the dwelling quarters of the watchman are?

A. It was supposed to be, yes.

Q. Well, I mean when you got upstairs, did you find dwelling quarters around the windows indicated by the curtains?

Q. Whether I found the windows there?

Q. Whether the room in which the watchman lived was that room, or did these windows with the curtains border on that room?

A. Well, that I really don't know, because I didn't go inside and look out to see whether those were the windows.

Q. Was the dwelling room on that side of the house?

A. It was.

Q. Now, Petitioner's Exhibit No. 7 is in your own handwriting, isn't it?

A. It is.

Q. And every word of it, the printing and writing, is in your own handwriting?

A. It is, with the exception of one error on that.

Q. What is that?

A. That is on the floor you are talking about. I didn't change that. The living rooms are over this way (indicating) and it practically faces—this here room (indicating) here was in back of the living quarters, as you call them.

[fol. 81] Q. I see. In other words, on the last page of this Exhibit you have the following words: "Storeroom. Found in this room 92 bags of whiskey, and 150 cases of whiskey," and on the side of it to the left, you have a diagram showing living rooms of the watchman?

A. Yes, sir.

Q. Now, what you meant by that was that the living room was on the side of the house known as No. 609?

A. That is right.

Q. And this room which contained the 92 bags of whiskey was immediately behind?

A. That is right.

Q. And adjoining the living rooms in 609?

A. That is correct.

Q. Now, on the diagram of the third story you show a line as if it were a division between two separate rooms?

A. I do.

Q. That line represents a partition, a wooden partition on the whole floor dividing the building?

A. It does not.

Q. Well, what is that line (indicating)?

A. It indicates that there is different beams and stuff like that, and part of it is boarded up, the same as the store rooms.

[fol. 82] Q. In other words, I will show you Exhibit No. 5 for identification and ask you whether that is a photograph of—whether the wall in that, to the left, shows that partition wall?

A. It resembles it somewhat, you understand, but this is only the part off the elevator.

Q. Yes.

A. As you get off the elevator there was a partition that bore no locks and had these beams which were part of it.

Mr. Kraushaar: I now offer that photograph in evidence.

The Commissioner: I will take it in connection with the testimony.

The Witness: That is the rear part of 609, off the elevator.

(Petitioner's Exhibit No. 5 for identification was thereupon received in evidence and marked "Petitioner's Exhibit No. 5 in evidence, July 25, 1923.")

By Mr. Kraushaar:

Q. Now, I show you Exhibit No. 3 and ask you whether the wall to the left correctly reflects the nature of that wall—if that is a wall?

A. I don't remember that. I didn't make that careful a scrutiny [fol. 83] to look it over, and I don't remember.

Q. But you did make a careful enough scrutiny of the building to be able to make this diagram, Mr. Smith?

A. I did—and still I am wrong.

Q. Still you are what?

A. Still I was wrong, on that one thing.

Q. I see. Now, the second floor of this building is not used as a garage, is it?

A. It is not.

Q. It is a storage room. Both of them are storage rooms, aren't they?

A. Well, you can call it a storage room if you want to. There were goods stored there, but whether it was used for that purpose or not, I don't know.

Q. The third floor is not used as a garage, is it?

A. No, sir.

Q. Now, the fourth floor of the building, you don't know what that is used for?

A. I do not.

Q. You did not inspect that portion of the building at all?

A. No.

Mr. Kraushaar: That is all.

[fol. 84] Mr. Cohen: That is all. You do not raise any point on the question that the stuff which was found there contained more than one half of one per cent of alcohol by volume? You don't raise that question, do you? Otherwise, I will have to go to the trouble of going upstairs for the chemist.

The Witness: The samples were brought here.

Mr. Cohen: Then that is conceded?

Mr. Kraushaar: Well, I do not concede it, but I don't dispute it. I am not raising any question here as to the alcoholic content of the goods seized.

Mr. Cohen: In your papers you say there was so much whiskey seized.

Mr. Kraushaar: I am not raising any question about it, but I am not saying it is conceded.

By Mr. Kraushaar:

Q. Mr. Smith, that is the return, which your associate, Mr Einstein, made—the writing in pencil on the back?

A. Why, he signed that and I made out the return.

Q. That is the whole return?

A. That is the return that I made out on the premises.

Q. And you made no other return at all?

A. That is the only one. I gave a copy of it to John Steele.

By the Commissioner:

Q. Mr. Smith, did you personally make this return?

[fol. 85] A. Isidor Einstein made that return. I was here with him when he made the return.

Q. Your habit in making such returns upon seizures is to bring in the original warrant and, on the back of it, you indorse what you have seized?

A. I do.

Q. And then you lay it on my desk?

A. Yes, sir.

Q. That is your usual practice?

A. Yes.

Q. Well, in that, of course, you know that you do not conform with the law as to the making of returns? That is, these returns are not made in conformity with the law.

A. Well, they are made as far as we know—they are made the same as the returns on the back——

Q. Well, what you do make in the way of a return is the statement on the back of a warrant of precisely what you have seized under the warrant?

A. Yes, sir.

Q. And, when you make that return, you do not stop to swear to it, but you lay it on my desk?

A. Yes, sir.

Q. And I file it with my papers?

A. Yes, sir.

[fol. 86] Mr. Cohen: If there is any question about that, Mr. Commissioner, I ask leave under the decisions to file a regular return pursuant to the statute, if that is necessary.

Mr. Kraushaar: I think it is too late, at this time.

Mr. Cohen: No, I don't think so, but if they are making any question about it, I want leave to file a correct return.

The Commissioner: Oh, I don't think so. I would say, further than that, that the matter of the return is a thing entirely separate and apart from the question of the validity of the search warrant or its execution.

Mr. Kraushaar: Well, I want to preserve my rights on the question, Mr. Commissioner.

The Commissioner: All right, I will give you an exception to my suggestion.

Mr. Kraushaar: Thank you. I accept.

Now, let me renew the motion that I made at the beginning of the case, and add to it further objections.

At the outset of this case I moved to dismiss the proceedings and vacate the search warrant on the ground that the affidavit on which the warrant was issued was entirely insufficient. I neglected to addd [fol. 87] the following ground, that the affidavit upon which this search warrant was issued describes in the caption the premises to be searched as follows: "Premises known as a certain garage at 611 West 46th Street, New York City." The affidavit describes the place at which the prohibition agent was, as in front of the garage located in the building at 611 West 46th Street. He says there that he saw the truck with the cases stenciled "Whiskey." He lays no foundation for the search of any other portion of the building, except in

the affidavit he says he makes the affidavit to procure a search warrant for the building at the above address and any room or rooms used in connection with the garage, the basement or sub-cellar beneath the same, and to seize any intoxicating liquor found therein.

The warrant directs not only the search of the garage, but likewise the building, safe or desk, container, receptacal, basement or subcellar, building, room or rooms connected or used in connection with the garage. There is no proof in the affidavit——

The Commissioner: Will you let me see the affidavit?

Mr. Kraushaar: Yes (handing paper to Commissioner).

There is no proof in the affidavit that any other building except the garage contained intoxicating liquor in violation of the pro- [fol. 88] visions of law, and, for that reason, the search warrant was too broad in character and was improvidently issued.

The proof indicates that the agents not only searched the garage, but searched different floors in the building, and there is no proof tending to show that these floors were in anywise used in connection with the garage or had anything whatever to do with the garage. On the contrary, it appears by the testimony of Mr. Smith himself, who made a diagram of the premises, that the upper floors were used as storage rooms, and one portion of it, on the third floor was used for dwelling quarters, thus directly contrary to the statement in the affidavit that the building was used only for business purposes.

I submit that this search, therefore went beyond the warrant— that the warrant was not only improvidently granted in respect to the place to be searched, but that the agents, in making the search went beyond the authority of the warrant and searched the premises other than those which were used in connection with the garage, and the search and seizure were therefore wrongful and unlawful, and, for these reasons, I ask that the warrant be vacated, and the goods restored to the petitioner.

Furthermore, it appears from the testimony in this case that this [fol. 89] building was known as not only as 609, but 611 West 46th Street as well. The photograph of the building which is in evidence indicates that it was built on one plot and, from the outside, one would not know whether there was any dividing line or party wall between the two portions of the building or not, but it does appear from the testimony of the agents that while the garage on the lower floor was entirely open between the two buildings, the upper floors were divided in some respects by partitions.

The Commissioner: No, that does not appear from the testimony. I disagree with you. The testimony shows that on the first floor it was all open.

Mr. Kraushaar: Yes, that is what I say, it was all open.

The Commissioner: That is, on the second floor there were no partitions.

Mr. Kraushaar: Oh, yes, but as I understand it, a partition does not necessarily mean, in my judgment, a solid wall of masonry, nor does it necessarily imply that the walls must be solid.

The Commissioner: The testimony of Einstein in regard to the second floor was that when he got out of the elevator, he could see all through the second floor; isn't that right?

[fol. 90] The Witness: Yes, sir.

Mr. Kraushaar: Mr. Smith says, and his diagram shows, that there was a dividing post, with siding on it, and there was an opening through which he could go from one building to another, and I submit that the mere fact——

The Commissioner: All I would say, Counsellor, is this, that the basement situation controls the whole situation. That was entirely open. Now, there is no dispute about that. The testimony shows that there was on the one side, a staircase running up, I presume, to another floor of the building. One the other side there was an elevator. There had been a staircase running up on that side of the building, but that staircase had been closed up so that it was not open to use; so that the elevator on the one side and the staircase on the other side, served the entire purpose of access to the upper floors of the building.

Mr. Kraushaar: I submit——

The Commissioner: Now, the sign on the building described it as a warehouse. There is nothing on the sign describing it as a garage, and yet the evidence shows that it was a garage. I do not believe that the difference in description between "Garage" and "Warehouse" would be material.

[fol. 91] Now, the agents in their affidavits—the agent swears that this building is used for business purposes only. I have made inquiry about that, and the evidence shows that there was a part of that building which had a cot in it and a table and some chairs. It fails to disclose anything in the way of running water or bath or toilet——

Mr. Kraushaar: Mr. Commissioner, I am prepared to prove by my own witness here——

The Commissioner (continuing): —which are appurtances of a residence. I suppose the watchman slept in the building from time to time.

Mr. Kraushaar: If you will permit me, I will prove by my own witness here that a portion of the place was used for dwelling purposes and that he lived there as well.

Mr. Cohen: That is not before the Court now. Your Honor is ruling on the evidence that is presented.

The Commissioner: I don't think it is, but of course I want to give you every opportunity.

Mr. Kraushaar: Will you reserve decision, then, at the end of this particular portion of the case?

The Commissioner: Absolutely. You can submit briefs on that.

Mr. Kraushaar: Very well. I will call Mr. Steel.

[fol. 92] JOHN F. STEELE, the Petitioner, was called as a witness in his own behalf and, being first duly sworn, testified as follows:

Direct examination by Mr. Kraushaar:

Q. Now, Mr. Steele, are you the Petitioner in these proceedings?
A. Yes, sir.
Q. Where did you reside on the 6th day of December, 1922?
A. At 609 and 611 West 46th Street.
Q. Now, what floor of that building did you live on?
A. On the third floor.
Q. Was part of that floor used for dwelling purposes?

Mr. Cohen: That is objected to as calling for a conclusion of the witness.

Q. Well, what was the third floor used for?
A. Well, the third floor was used for—half of one side was let out to a drug company, boarded off and let to the Betts Drug Company. They rented half of the entire floor and it was partitioned off with doors, and the other half was used for storage, and the front was used for a living room.
Q. How many living rooms are there in the front?
A. There is the kitchen, and there is a big room, alongside of it.
[fol. 93] Q. Did you live in the dwelling quarters?
A. Yes, sir.
Q. Did anybody else live there?
A. Well, Smith, the watchman. The two of us lived there.
Q. Was there running water in the place?
A. Yes.
Q. Did you do any cooking on the premises?
A. Yes, there was a stove and we did cooking and everything.
Q. You say there was a stove there?
A. Yes.
Q. And you cooked there?
A. Yes.
Q. And ate your meals there?
A. Yes.
Q. Was there a lady living in the place at that time?
A. Yes, sir, at that time, she was.
Q. Was she doing the cooking and taking care of it?
A. Yes, sir.
Q. Now, this building, 609 and 611: Was that one building or was that two buildings?
A. No, there is two buildings.
Q. Now, the ground floor, is that divided off? Do they run in on
[fol. 94] one side and——
A. No, that is not divided off. There is pillars in the center, but it is all wide open.
Q. It is open?
A. Yes. We get cars in there, you see, and you could not get any amount of cars in there if it was partitioned off.

Q. Now, that lower part is used as a garage, is it?
A. Yes, sir.
Q. Did you use it for that purpose, yourself?
A. Yes.
Q. Was the second floor used for garage purposes?
A. No, sir.
Q. What was the second floor used for?
A. It was used for storage. The Liquid Carbonic Company at that time only had half of the floor.
Q. Who is the Liquid Carbonic Company?
A. They are the soda-water people, located on 28th Street, and they used it for storage purposes. They stored syrups and a lot of counters and shelving that they had, which they used when they erected candy stores, and they had the whole business up there, whatever belongs to a candy store.
Q. And that was leased to them?
A. Yes.
[fol. 95] Q. The third floor was used by yourself?
A. Half of it was used for storage, and the other half was let out to the medical people by the name of Betts & Company.
Q. Now, did you own the liquor that was found on the third floor?
A. Yes, sir.
Q. In the portion of the premises known as 609?
A. Yes, sir.
Q. That was your own liquor, was it?
A. Yes, sir.
Q. Did you own any part of the liquor found on the second floor?
A. The gin was on the second floor.
Q. Yes. Did you own that?
A. The gin, yes, sir.
Q. Do you know how it came on the second floor?
A. Well, there was—it was stored there, in rooms, you see.
Q. I see. Now, were you there at the time the officers made this search?
A. No, the officers—I was there at the time that an officer came there.
Q. Did you come there at the time they made the search and seizure or afterwards?
[fol. 96] A. I came at the time Mr. Einstein went for a search warrant.
Q. Yes.
A. And then, after he came back with the search warrant, they took me to the station house. I was not there afterwards.
Q. Well, did you know that Einstein was going for a search warrant?
A. I didn't know. He said he had a search warrant, but I didn't see it. Smith, I guess, was the one that seen the search warrant and let them through the building.
Q. You were not there when he came with the search warrant?
A. I was there, but I didn't know he had a search warrant. Mr. Smith told me that he was going for the search warrant.

Mr. Cohen: When you say, "Smith," whom do you mean?
The Witness: Moe Smith.
Q. He told you that Einstein was going for the search warrant?
A. Yes, and I remained there until Einstein came back. He came back in a taxi-cab, and he said that I would have to come to the station house, and of course I went to the station house.
[fol. 97] Now, the second floor of that building: Is that divided off in any way?
A. Yes, sir.
Q. How is it divided off?
A. It is just divided off by wooden partitions.
Q. Is it half of the floor that is divided off?
A. Half the floor is divided. There is the beams or uprights of the buildings there, and there is boards all along. There is a door on the end.
Q. You could not get in or go from one part of the building known as the portion No. 609, to 611, on the second floor?
A. Well, you see they can get into both buildings there by way of the elevator.
Q. Yes.
A. Of course, there is a stairway for 611, but there is also a stairway for 609, but that is seldom used.
Q. But there is a stairway there?
A. There is a stairway there. The elevator is fixed so that you can get into both buildings by way of the elevator.
Q. Let me ask you this question: Is the elevator strong enough for an automobile?
A. Yes, sir.
Q. Can you put an automobile on the elevator and go up with it?
[fol. 98] A. Yes, a medium sized automobile, but not a large size.
Q. Did you ever take automobiles up there?
A. A small Ford, maybe, we took up there.
Q. You haven't stored any automobiles up there recently?
A. Not the last year.
Q. Did you at any time ever use the second floor of that building for the storage of automobiles?
A. No, sir.
Q. Third floor?
A. No, sir.
Q. Or the fourth floor?
A. No, sir.

Mr. Kraushaar: That is all.

Cross-examination by Mr. Cohen:

Q. Are you married?
A. No, sir.
Q. Where did you live before you lived on 46th Street?
A. I lived at 276 West 38th.
Q. How long did you live there?
A. Oh, about three years.

Q. And before you moved there?
A. I have been up at that garage for two or three years—a couple of years. I use to have a lot of trouble with people getting in there [fol. 99] and stealing things, so——
Q. Where you are living now?
A. Yes.
Q. Who else lives there?
A. The watchman, Smith.
Q. And he has a wife?
A. Yes.
Q. There is one bedroom?
A. Yes, he sleeps there, and I sleep in the kitchen.
Q. You are sleeping in the kitchen?
A. Yes.
Q. Now, this partition making these rooms, was of the same kind of boards that you have here (indicating)?
A. All the same kind of boards.

Mr. Kraushaar: No, Counsel is asking you whether the room divided off as the dwelling room, is divided by the same kind of boards as that.
The Witness: It is partitioned off with regular boards running up and down. The other ones run this way (Illustrating).

Q. There are no spaces between the boards?
A. No spaces.
Q. All you have is a small cot?
A. That is all.
Q. And the same in this so-called bedroom?
[fol. 100] A. There is a bedroom with two cots in there.
Q. This separate room where you say you had your whiskey adjoins the bedroom where Smith sleeps?
A. Yes, that is right in the back.
Q. That is also partitioned off with boards?
A. Yes, sir.
Q. And it has a door to it?
A. Yes.
Q. And that door leads out to the open floor?
A. Yes, and also on the other side.
Q. There is one leading into Smith's room and one leading outside towards the elevator?
A. Yes.

The Commissioner: I don't think that is necessary. We have a complete description of the situation. Do you want to put in any memorandum, Counsellor?
Mr. Kraushaar: Might I be permitted to renew the motions made at the beginning of the case?
The Commissioner: I shall deny those motions, subject to hearing you on memorandum.
Mr. Cohen: I haven't any time to put in a memorandum, as I am going away.

The Commissioner: Very well. My own impression is that I shall deny all of these motions at this time. In other words, I am with [fol. 101] the government's contention at the present time. Now, if you care to put in a memorandum, you may do so and try to break down my present conviction.

Mr. Kraushaar: All right, I will do that.

The Commissioner: Take a week and then give me your memorandum by Saturday, so that I can look it over on Sunday.

Mr. Cohen: That is all right, because I don't think I am going away until Tuesday. You will let me see your memorandum?

Mr. Kraushaar: Yes.

The Commissioner: Yes, serve me with your memorandum and I can submit it to the District Attorney.

Mr. Kraushaar: Can't you give me more time?

Mr. Cohen: Yes, except that I am going away.

The Commissioner: Submit your memorandum to me by Saturday, so that I can go over it on Sunday.

Mr. Kraushaar: Very well.

(Hearing closed.)

Petition Denied. 8/29/23.
Samuel M. Hitchcock, U. S. Commr., S. D. N. Y.

[fol. 102] List of Exhibits

Petitioner's Exhibit 1. Photograph.

Petitioner's Exhibit 2. Photograph for Identification.

Petitioner's Exhibit 3. Photograph.

Petitioner's Exhibit 4. Photograph for Identification.

Petitioner's Exhibit 5. Photograph for Identication.

Petitioner's Exhibit 6. Photograph.

Petitioner's Exhibit 7. Diagrams made by Moe Smith.

Petitioner's Exhibit 8. Photograph.

Petitioner's Exhibit 9. Photograph.

[fols. 103 & 104] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby Stipulated and Agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties, and that the original exhibits presented at the hearing can be used on the argument on appeal if requested by the Court.

Dated, November 23, 1923.

Wm. Hayward, Attorney for the United States, Southern District of New York. Meyer Kraushaar, Attorney for the Petitioner.

[fol. 105] UNITED STATES OF AMERICA,
Southern District of New York, ss:

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this twenty-eighth day of November, in the year of our Lord one thousand nine hundred and twenty-three, and of the Independence of the said United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk. [Seal of the District Court of the United States, Southern District of N. Y.]

Endorsed on cover: File No. 29,995. S. New York D. C. U. S. Term No. 685. John F. Steele, appellant, vs. The United States of America. Filed December 6th, 1923. File No. 29,995.

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES

[redacted]

No. [redacted]

[redacted]

JOHN P. STEVENS, PETITIONER

v.

[redacted]

[redacted]

(30,601)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 636

JOHN F. STEELE, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1924

[fol. 1] THE UNITED STATES OF AMERICA, ss:

WRIT OF ERROR—Filed April 8, 1924

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court of the United States for the Southern District of New York, before you, between the United States of America, Plaintiff, and John F. Steele, Defendant, a manifest error has happened, to the great prejudice and damage of the said John F. Steele, as by his complaint appears, we being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Washington on the 30th day of April, next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Hon. William H. Taft, Chief Justice of the United States, the 8th day of April, 1924, and of the independence of the United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk of the District Court, Southern District of New York. (Seal of District Court of the United States, Southern District of N. Y.)

Allowed by Edwin L. Garvin, United States District Judge.

[fol. 2] **IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, OF THE OCTOBER TERM, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND TWENTY-THREE**

INFORMATION

Now comes William Hayward, United States Attorney for the Southern District of New York leave having been first had and obtained and respectfully informs the Court that heretofore to wit, on the 6th day of December, one thousand nine hundred and twenty-three, in the Southern District of New York and within the jurisdiction of this Court, John Steel unlawfully, wilfully and knowingly

did possess in garage at 611 West 46th Street, New York City a quantity of intoxicating liquor to wit 150 cases whiskey, 92 bags, whiskey, 1 five gal. can alcohol, 6 five gal. jugs whiskey, 33 cases gin, 102 quarts whiskey, 2 fifty gal. bbls. whiskey, which then and there contained more than one half of one per cent of alcohol by volume, and which then and there was fit for use for beverage purposes against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Title 11, Act of October 28, 1919.)

William Hayward, United States Attorney.

[fol. 3] In United States District Court for the Southern District of New York

United States of America, Plaintiff,

against

John F. Steele, Defendant

Bill of Exceptions

Be it remembered that the above entitled cause came on for trial on the 12th day of March, 1924, being one of the days of the March Term of said Court, before the Hon. Edwin L. Garvin, one of the Judges of said Court and a jury duly impanelled.

David Siegel appeared as counsel for the Government.
Meyer Kraushaar appeared as counsel for the defendant.

Colloquy Between Court and Counsel

Before the jury was impanelled, Mr. Kraushaar addressed the Court as follows, and to which the Court made the following rulings:

Mr. Kraushaar: At the outset I should like to place upon the record before the jury is drawn that the trial of the action be stayed, upon the appeal from the order of this Court declining to quash the search warrant upon which the evidence was secured and upon which the prosecution is based. I take it that if the United States Supreme Court should reverse the search warrant, this proceeding must necessarily fall.

The Court: Motion denied. The point as suggested by counsel may be included by the defendant in his points for reversal on appeal and assignment of error in the event of conviction, and any wrong which the District Court may do, or any error which may be committed, if error, can be corrected by the Circuit Court of [fol. 4] Appeals upon review of any conviction.

Mr. Kraushaar: This case will of necessity involve a constitutional question and go direct to the Supreme Court. I am going to

raise that question. As soon as the prosecution has opened the case to the jury I am going to renew my application to quash the search warrant and suppress the evidence and raise any additional point which I did not raise before the United States Commissioner or before the District Court in the prior case and perhaps that may change your Honor's ruling.

The Court: I will hear it and give careful attention to it.

(Mr. Siegel, on behalf of the Government, opened to the jury.)

Mr. Kraushaar: I desire to avail myself of the opportunity at this time of presenting the defendant's case to the jury. It isn't usual in these courts, but I should like to do it.

The Court: That will be permitted.

(Defendant's counsel opens to the jury.)

The Court: Please confine yourself to what you expect to prove.

Mr. Kraushaar: Yes, your Honor, but I think in order to present that intelligently to this jury it is necessary, by way of introduction, to call their attention to these constitutional provisions of which we must all take judicial notice and be obedient.

Mr. Siegel: If the Court please, I do not see how the question of the legality of the search warrant could possibly be one of fact.

The Court: It cannot be, but Mr. Kraushaar says he cannot explain to the jury the facts without these preliminary statements, and the Court feels it should not interfere as to a statement of that kind by counsel.

The Government to maintain its case offered the following evidence, to wit:

Moe Smith, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

[fol. 5] Direct examination by Mr. Siegel:

Mr. Kraushaar: If your Honor please, I take it that the District Attorney will concede that the evidence according to his opening, upon which this information is entirely based, was secured under a search warrant which was issued by the Honorable Samuel Hitchcock, United States Commissioner, in December, 1922. I think the orderly procedure would be if I at this time offer that search warrant in evidence and the affidavit upon which it is based and make my motion at length to vacate it.

The Court: Has not that motion been made and denied by Judge Winslow?

Mr. Kraushaar: Even if it has, your Honor may not be willing to follow Judge Winslow's decision on that point, and on the further ground, the point I want to raise now has never been raised before Judge Winslow.

The Court: Please confine yourself to any new points which have not heretofore been presented to the Court. I do not think the

orderly procedure would warrant a judge sitting in a district to vacate an order upon the same facts presented to a second District Judge. Present your new points but I shall not hear argument upon them.

Mr. Kraushaar: I desire to offer this search warrant and affidavit in evidence.

The Court: Received.

(Marked Defendant's Exhibit A.)

Mr. Kraushaar: Your Honor, I move to suppress the evidence about to be given by the witnesses for the prosecution and to vacate the search warrant upon the ground that the constitutional rights of this defendant have been invaded because the warrant issued by the United States Commissioner was issued in violation of the fourth amendment to the Constitution of the United States, in that the same was not issued upon probable cause supported by oath or affirmation, particularly describing the place to be searched or the person or things to be seized; second, because the search and seizure conducted under the warrant aforesaid was unreasonable; third, because the warrant was issued in violation of Article 5 of the amendments to the Constitution of the United States, in that the same deprives the claimant of his property without due process of law, and on the further ground that by virtue thereof defendant was [fol. 6] compelled to be a witness against himself in a criminal proceeding. Fourth, because the said warrant was based upon conjecture, surmise and suspicion, and not upon reasonable or probable cause of a violation of the aforesaid provisions of the Constitution; that search warrant limited the officer to whom it was directed to search the garage in the premises 611 West 46th Street in the Borough of Manhattan, City and Southern District of New York, and the officer in making the search in violation of the Constitutional guarantee, searched other and different premises, to wit, the premises 609 West 46th Street, in the Borough of Manhattan, City and Southern District of New York; on the further ground that the affidavit upon which this search warrant was based shows that the only place upon which the liquor was first seen or anything resembling the nature of liquor or anything upon which probable cause may be based, that there was liquor, was in the garage 611 West 46th Street, and the search warrant permitted the search of not only the garage but of any safe, desk, store room, receptacle, basement or a sub-cellar, building, room or rooms used in connection with such garage, without any proof either by oath or affirmation, of Isidor Einstein or any other person that there was -ny safe or desk, room, container, receptacle, basement, sub-cellar, building, room or rooms used in connection with such garage, that there was any proof in this affidavit that there was any liquor, or any reasonable cause to believe there was any liquor in any safe or desk, storeroom, container, receptacle, basement or sub-cellar, building, room or rooms used in connection with said garage.

Now I wish to raise the point that has never been raised, either directly or indirectly before Judge Winslow or before the United States Commissioner in my application to vacate the search warrant. It had been held in a recent case, the case of United States against Musgrave, 293 Federal 202, Judge Woodruff, and I think the reasoning in that case is sound, logical and clear, and I cannot see how any one can get away from it—that a search warrant can only be executed by an officer of the United States and can only be issued to an officer of the United States and that a prohibition agent is not an officer of the United States as held by a numerous line of decisions. This search warrant is directed to Isidor Einstein, general prohibition agent, who obviously is not an officer of the United States, and therefore the warrant was void, there was no right to make the seizure and search, the warrant having been issued to an unauthorized person.

[fol. 7] There is another consideration I wish to point out for the record, even assuming that Judge Ervine correctly states the law. This search warrant is insufficient and was illegally obtained because in the affidavit upon which it was issued Isidor Einstein simply swears he is a general prohibition agent. The Federal Court could not take any judicial notice of the meaning of the term general prohibition agent. In the first place, the statute does not authorize the appointment of any such——

The Court: He need not have had anything to do with the Government whatever, as far as official capacity is concerned. The Commissioner must have proof before him and provided it is competent proof——

Mr. Kraushaar: The warrant expressly states that the only proof upon which the Commissioner acted is the affidavit of Isidor Einstein.

The Court: I think his position as Federal Prohibition Agent, or whatever position he might have had is absolutely immaterial so long as he is an individual.

Mr. Kraushaar: The law does not recognize any such official as a general prohibition agent. The power of enforcement of the National Prohibition Act is vested in the Commissioner of Internal Revenue as I understand it and agents and employes appointed by him. There isn't any such office as a general prohibition agent. Now it may well be that Isidor Einstein was appointed by the Commissioner of Internal Revenue as his agent, but his affidavit does not state that he was so appointed. He submits no proof except he says I am a general prohibition agent, whatever that may mean. Legally it means nothing in my judgment To put him in a position according to Judge Ervine that internal revenue agents may execute and swear out search warrants, seems to me perfectly clear that before a search warrant can be obtained, the person applying must qualify himself and prove that he has some official standing and that he was duly appointed by the Commissioner of Internal Revenue. There is no such thing in this affidavit at all. Mr. Einstein simply says I am a general prohibition agent. While the

Commissioner may have known of Einstein's official capacity, he had no right to issue this search warrant unless Einstein was ready to swear at the time this affidavit was obtained that he held an appointment from the Commissioner of Internal Revenue or by his duly authorized agent, the Prohibition Commissioner.

The Court: The Commissioner has a right to issue a search war-
[fol. 8] rant upon proof being submitted to him of a violation of law. Each motion is denied with an exception to the defendant. Proceed with the proof.

Mr. Kraushaar: Exception.

By Mr. Siegel:

Q. Mr. Smith, are you an agent of the Treasury Department of the United States?

A. I am.

Q. And how long have you been in the service?

A. January 26, 1920.

Q. Did you go to the premises 611 West 46th Street on December 6, 1923?

Mr. Kraushaar: At this time may I interrogate the witness preliminary to further questions to show that Mr. Smith did not examine these premises or enter these premises before the search warrant was obtained?

Mr. Siegel: All that defendant's counsel could do he has already done.

The Court: Make your request.

Mr. Kraushaar: I ask your Honor at this stage to examine the witness for the purpose of showing that the witness had no evidence of any kind against these premises until the search warrant was obtained.

The Court: Motion denied.

Mr. Kraushaar: Exception.

The Court: December 6th what year?

The Witness: 1922.

Q. 1922?

A. Yes, sir.

I went to premises 611 West 46th Street accompanied by Agent Einstein. The building is a brick building which covers the premises 611 and 609 West 46th Street. I believe it is a four-story brick building having two entrances, garage entrances—big doors leading to this interior on the ground floor, one open space. I should judge the front is about 60 by 50—something like that. I didn't measure it exactly but it was all open. Nothing in the center to support any one of these two doors. There was just one open loft, and that extended clear through from all of 609 and 611 West 46th Street. Agent Einstein was with me. We entered the premises together. Agent Einstein served the search warrant on the man that was in
[fol. 9] the interior by the name of Smith. We asked him what his

business was. He said he was the watchman. We told him we were Government Agents and after he had inquired if we had a search warrant we told him we had and were going to search the premises. We looked on the main floor and found nothing. We then asked him to take us up to the first floor in the elevator. We entered the first floor and after getting off we turned to our right about eight or ten feet. I observed a partition about 14 or 16 feet high and the dimensions of the room were about 10 by 20. I observed a light coming through the premises, the top of this partition. I went to the door of this room and I knocked. Somebody from the inside had opened it and there I found three men bottling what I found later to be whiskey from bottles and different containers. I also found in this room corking machines and different hose and pipes, funnels and an assortment such as would be found in a place of that character.

I then asked these men what they were doing there. They said they were working, I asked them who they were working for. They said they were working for a man named John Steel.

Mr. Kraushaar: I object to this and move to strike it out.
The Court: Objection sustained. Strike it out.

The Witness: I placed these men under arrest for violation of the National Prohibition Law.

Mr. Kraushaar: I move to strike that out.
The Court: Motion granted.

After my conversation with these men I left Agent Einstein in charge and went outside and called up the police station, and asked for a few police officers.

Mr. Kraushaar: I move to strike that out.
The Court: Motion granted.

After my telephone call I went to the front of the building on the 609 side and there found a room that was locked. Smith opened this room for us.

Mr. Kraushaar: Do you mean Steel or Smith.
The Witness: Smith.
Mr. Kraushaar: In the presence of the deft.
Witness: No he was not there.

Smith opened this door and we found 33 cases. From that floor we went to the floor above and there found another room. In this room we found 150 cases of whiskey and 92 bags of whiskey. After being in that building about half an hour the defendant John Steel came to the building and he said, "Good morning, officers," I said, 'Who are you?' He said, "My name is John Steel. This is my place.' I asked him whether he owned the building. He said no. He said that he had a lease on the entire building from top to bottom. He told me his rental. I believe, was $780 or something to that effect. If you will permit me, I will look at the

record. He said his rental was $780.33 a month; that he had a lease from 1920 to 1928; also told me that his bank account was at the Chelsea National Bank, 14th Street Branch, and that he had about $400 on hand. He said he had the garage and storehouse there for a period of eight years. He told me it was the first time that he handled any liquor; that he was only in the liquor game a short while and he was taking as chance; that he had these three defendants whom we had arrested working for him, by the name of Michael Clark, George Kohler and James Leon. We then placed the defendant under arrest and took him to the 47th Street police station and seized the goods and took it to the Knickerbocker Warehouse. We took one bottle for a sample and Agent Einstein delivered it to the United States Chemist in this building. This is the bottle he took for a sample and I sealed it.

Mr. Siegel: I offer that for identification.

(Marked Government's Exhibit 1 for identification.)

[fol. 10] Cross-examination by Mr. Kraushaar:

I never entered the premises before the search warrant was obtained. This papers, Government's Exhibit A, is the search warrant under which Isidor Einstein and I acted. That was the only one we had. It was in possession of Agent Einstein when we entered the premises. This is a copy of the return of the goods seized which we gave to John Steel. I made the pencil memorandum and Agent Einstein signed it. That was the inventory or return which we made.

Mr. Kraushaar: I offer that in evidence.
The Court: Received.

(Marked Defendant's Exhibit B.)

The Witness: This was the only affidavit upon which the search warrant was obtained. I didn't appear before the United States Commissioner when this search warrant was issued. I stayed at 46th Street and Eleventh Avenue, I believe it was, while Agent Einstein came to this building and secured a search warrant. I had no authority other than the search warrant to personally enter these premises. I had never been inside of the premises before the search warrant was obtained. I never saw how this building was constructed. I did not know what was contained on the first floor. I did not know what was on the second floor, nor on any other floors of the building. I said the lower part of the building was used as a garage, and the only way I knew that was because I saw automobiles in there being fixed and some men working on the same. Before I entered the building I did not know whether there was any room, store room, container, receptacle, basement or sub-cellar, building, room or rooms connected or used in connection with the garage.

Mr. Siegel: At this time I must register an objection to the continuation of such questioning.

The Court: I am endeavoring to allow this in order to satisfy Mr. Kraushaar that he has a full basis for any review if he should have to take a review. I think myself it is unnecessarily full, but where counsel urge it so earnestly as counsel does here, his desire to have this record in such shape that the questions may be presented, if necessary, to a reviewing court, I think there should be a great latitude in preparing the record.

Q. Now what time of the day did you go there?

Mr. Siegel: May I ask what date this is?

Mr. Kraushaar: I am talking about the 6th of December, 1922.

A. I should judge around eight something.

[fol. 11] Mr. Siegel: Will your Honor permit this line of questioning? It is wholly irrelevant and incompetent.

The Court: This is cross examination as to the witness' credibility. He may be asked that.

The Witness: I should judge it was around eight, eight-fifteen, early in the morning I know we got there. I don't know how long it took Agent Einstein to come down here, but I believe he got the search warrant some time in the morning before eleven o'clock. To my best recollection I believe somewhere around 9.15 or 9.20 when he left 46th Street to come down for the search warrant.

Q. So that you were only there altogether about three quarters of an hour?

A. Something like that I guess. I didn't time myself at all. We cannot be accurate with it and I won't testify to the exact moment we got there or when we left. When I arrived there Einstein left me at the corner and went down the street. I stayed up on the other side of Eleventh Avenue. I believe it was Eleventh Avenue, the street between which this garage is that was searched, Eleventh and Twelfth or Twelfth and Thirteenth—I don't know just which avenues it covered, but I stayed on the east side and Agent Einstein went down towards the garage and planted himself I should judge about thirty or forty feet from the garage. I don't know just what transpired at the garage while he was there, but I observed the truck going into that garage. I did observe the truck. It was a covered truck and I did not observe the contents of the truck. I did not know what it contained. I did not observe the truck again after Einstein went down to the Commissioner's office. I had left that corner and went down towards 45th Street and made an appointment with Agent Einstein to meet me back at 45th Street. I don't know whether that truck remained in the garage or left the garage. I never saw the truck again when I entered the garage. The first time I entered the garage the truck was not there. When I entered the premises on this search warrant I didn't see that wagon.

Q. Did you see any cases in that garage marked whiskey?

A. An empty case on the elevator marked whiskey.

Q. Was that in the garage or in the elevator?

A. It was in the garage proper. The elevator leads from the garage floor. I said that the case was empty when I saw it in the garage. There was nothing inside the case at all. The place I found the liquor in was the upper part of the building, above the street floor. In one part of the building there was supposed to be a dwelling.

Q. Wasn't there a dwelling?

A. Well, I wouldn't live in it. Smith said he lived there. I saw something that looked like a bed; it was a cot or something. I saw [fol. 12] Mrs. Smith there, in terrible shape. I saw a stove and some part of household effects, frying pans and stuff like that.

Mr. Kraushaar: Now, if your Honor please, I move to strike out and suppress the testimony of Agent Smith on the ground that there is no proof shown that Agent Smith had the right to enter these premises. This search warrant is only directed to Isidore Einstein and affords no right to anybody whatever to enter these premises.

By the Court: How near the cot and stove which you say Smith stated to you was his, was this liquor that you found, how many feet away?

A. There is a room that stands directly in back of a partitioned-off room, back of and adjoining what they call a residence.

Q. And the liquor was found in a room partitioned off?

A. Entirely partitioned off.

The Court: Motion denied.

Mr. Kraushaar: Exception.

By Mr. Siegel:

Q. How large was this elevator?

A. Long enough for an automobile to be taken up on it—I should judge about twenty by thirty or something like that. The elevator runs up to the tope of the building.

Isidore Einstein, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Siegel:

I am employed by the Treasury Department of the United States. I have been so employed since the National Prohibition Act went into effect, since 1920. I obtained a search warrant from Commissioner Hitchcock to go to premises 611 West 46th Street, New York City. On December 6, 1922, I went to said premises accompanied by Agent Smith. We first went to the premises 611 to watch the premises. We had been there for a little while when I saw a truck going——

Q. I don't mean that; when you got the search warrant and you went to the premises 611 West 46th Street, what happened then?

A. Agent Smith and I went in there on the day in question and we met a man and I asked him who he was. I had a conversation with this man. I know his name. His name is Smith.

Q. And after you spoke to him where did you go?

A. I went through the building, I served the paper on him.

Mr. Kraushaar: I object to it on the ground it is incompetent, immaterial and irrelevant.

[fol. 13] The Court: Overruled.

Mr. Kraushaar: Exception.

Witness: Mr. Smith accompanied me over the building.

The Court: What paper did you serve on Smith?

Witness: A copy of the search warrant issued by United States Commissioner Hitchcock. This is the search warrant offered in evidence. On the first floor we found 33 cases of gin and 102 quarts of whiskey and one corking machine and six—five gallon jugs of whiskey and one five-gallon can of alcohol. On the second floor we found 150 cases of whiskey, 92 bags of whiskey, each containing six quarts. Of that one quart was taken off and delivered to the United States Chemist by me in this building. I had a conversation with Steel. I placed Steel under arrest and I walked with him to the 47th Street station house from the garage in West 46th Street. On the way to the station house he asked me whether I can do anything for him. I told him the best thing for him to do is to go to the District Attorney and tell him his troubles. He then told me also on the way down to the station house that this would be a great loss to him if he loses that stuff. He told me where he lived. He said I don't remember the exact number—somewheres in 34th Street he told me at that time. I had a conversation with him. I asked him about those three men, Michael Clark, George Kohler and James Leon. I asked him who those fellows were. He told me those three fellows worked for him. They had nothing to do with the business. The next day, however, we arrested all of them and brought them here. On the day I was there I noticed these three men filling up bottles, corking and labeling them, the three of them. Each one was doing different things. The bottle you show me marked for identification Exhibit 1, I found that bottle of liquor on premises 611 West 46th Street. I sealed it and turned it over to Mr. Quillan, the chemist the next day. I don't remember the exact size of the elevator in that building, but I think it was large enough for an automobile to go up on. The elevator ran from the ground floor up to the top of the building. I asked Steel who Smith was. He told me that Smith is a watchman at his garage, he worked there, and Smith told me the same. I had a talk with Smith about owning this liquor. On the way to the station house I asked him whether he owns the liquor in the place. He told me he did. The inventory on Exhibit B is the inventory for the receipt of which I signed. These are the liquors received and my signature appears on the return, on the copy of the search warrant. There was nothing said by Steel throughout by conversation at any time while I was there or

while I took him to the station house that these premises were used by him as a dwelling.

Q. Was any such thing told you by any of the men that you met [fol. 14] in such premises?

Mr. Kraushaar: I object to this line of testimony on the ground it does not appear that the defendant was warned of his constitutional rights, and that anything he might say might be used against him. The testimony is therefore incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Kraushaar: Exception.

Cross-examination by Mr. Kraushaar:

Before I obtained the search warrant, Defendant's Exhibit A, I had never entered the premises 611 West 46th Street. I knew what kind of a building it was. I gathered my information which would lead me to believe or tell me what kind of building it was by standing directly across the street where I could see it. I mean I looked from the street into the building. I was standing on the sidewalk and could look through. The door was wide open. I don't know how wide 46th Street is. I mean to tell this jury that I haven't any idea of the width of 46th Street.

Q. Will you point out please to the jury with relation to this room what you conceive to be the width of the street; was it as wide as this room?

A. I am not able to state the exact measurements of the street. I have no approximate idea of the width of 46th Street.

Q. Can't you tell the jury with relation to this room what, in your opinion, would be the width of 46th Street?

A. My best answer as I explained before, just as any other street. I wouldn't say it was a thirty-foot street. I wouldn't say it was a fifty-foot street.

Q. You tell this jury you were standing on the other side of 46th Street, you mean you were standing on the opposite side of the street?

A. I first passed by directly on the sidewalk; then I crossed the street on the other side and I was standing across the street.

Q. And you don't know what distance you were away from this building?

A. Just across the street.

Q. You don't know whether that was thirty feet or fifty feet?

—. I wouldn't say how wide the street is. I looked up to the building.

Q. Could you see the inside from the other side of the street?

A. I couldn't look up inside from the other side; I could see part downstairs, but I could see nothing upstairs. This is the affidavit [fol. 15] upon which I secured the search warrant and that is my signature. I read the affidavit before I signed it and knew the contents of it. I swore to the truth of it before the United States Commissioner. I said in this affidavit the building was used for business purposes only.

Q. How can you make the statement or could you make the statement that the building was used for business purposes only if you had never been inside of the building and had never seen the contents of the building?

A. My answer is that a garage and a private dwelling look entirely different. It appears to be a garage and nobody living in it and I was safe in making such affidavit. When I said this building was used for business purposes only I was not really guessing. I had never been inside that building, and it was not a mere guess on my part as to what the building contained.

Q. Do you mean to tell this jury seriously, sitting right there on the witness stand, that you were not guessing as to the contents of that building?

Mr. Siegel: I object to that. I do not think it is fair cross examination on the issue submitted here.

The Court: It is for the purpose of testing the witness' credibility. Overruled.

A. The appearance of the building, and that garage, in my judgment dictated to me that no person in the world lived there.

Q. You knew the obtaining of the search warrant was a serious matter?

A. It was nothing serious where the law was violated.

Mr. Kraushaar: I move to strike out the answer.

The Court: Motion granted.

Q. Did you know whether the obtaining of the search warrant was a serious matter?

A. Not serious where I saw liquor going into the garage.

Mr. Kraushaar: I move to strike out the answer.

The Court: You must either say yes or no, or say I cannot answer that yes or no.

The Witness: It was not serious to me at that time.

Mr. Kraushaar: I move to strike out the answer.

The Court: Yes, you must answer it.

A. It was not serious. Is that the answer?

I have been in the employ of the Government before I obtained this search warrant, close to three years. I am a naturalized citizen [fol. 16] of the United States. Prior to my naturalization I read the Constitution of the United States. I am not an attorney, but as a citizen I knew my rights. I knew one of the most sacred rights of the citizens of the United States is to be protected against search and seizure. I didn't know that the obtaining of the search warrant was a very serious matter when I was right, but if I was wrong, I knew it would be serious. When I said that this place was used for business purposes only I was not guessing. I saw a truck driving into the entrance to the garage. I saw the driver unload from the end of the truck a number of cases stenciled whiskey.

Q. Did you know at the time when you made this affidavit whether the cases which entered that garage were full or not?

A. I didn't examine any of the cases.

Q. You did not know whether the cases that went into that garage contained a single drop of whiskey, did you?

A. They were marked whiskey. I did not know whether they were full or empty.

Q. So you merely had a suspicion at the time that the cases contained whiskey?

A. I had no suspicion at all. I know what the word suspicion means. Suspicion means suspicion. That is the best answer I can make. Everybody understands your question and my answer. I know the difference between knowing what was in those cases and suspicion as to what the contents of the cases were.

Q. Will you please describe to the jury what the difference between those two expressions are?

A. The expression may be—if I went up on the truck and examined, but in this case I didn't open any of those cases.

Q. In other words, if you had opened the cases and examined them, you would have know- whether they contained whiskey?

A. I would have know- how many bottles would be there at the time, and of course I would have known whether they contained whiskey if I would see. If I would have looked into these cases I would have known what they contained, but I did not look into the cases.

Q. And you were merely guessing as to the contents by the fact that the boxes were labeled whiskey?

A. They were not labeled, they were stenciled and were whiskey cases.

Q. Will you answer my question yes or no?

A. I was not guessing. This is just what I stated in my affidavit. what I say—I didn't say I opened any cases.

Q. Mr. Einstein, you imagined, did you not, because the cases were labeled whiskey, that they contained whiskey?

A. They were not labeled, they were stenciled, regular whiskey cases.

[fol. 17] Mr. Kraushaar: I submit that the answer of the witness is irresponsive, and ask that it be stricken out.

The Court: The witness claims the question is incorrectly framed. He insists they were not labeled, but stencilled.

Witness: When I say the boxes were stencilled whiskey, I believed they contained whiskey. I did not know what they contained. My conclusion that the boxes contained whiskey was based solely on the fact that they were so stencilled.

I left the 46th Street address to go for the search warrant between 9 and 9:30, around that time, a little after nine. I went to the United States Attorney first and the United States Attorney dictated the affidavit to the stenographer. I read it first and signed it, before United States Commissioner Hitchcock.

Q. You didn't go anywhere after leaving the 46th Street address except to go immediately to the United States Attorney's office?

A. When do you mean?

Q. On that morning?

A. I stopped for about five or ten minutes on my way down.
Q. Where?
A. I think in our office 1107 Broadway.
Q. What did you do there?
A. I went in to see the Chief Clerk and he gave me permission to look up old permits.
Q. Where did you look for permits?
A. To look them up, whether a permit exists on that building on 46th Street.
Q. Did you look them up?
A. The clerk looked it up for me.
Q. But you didn't look it up?
A. He showed me all papers and all permitees.
Q. Did you look it up or the Clerk look it up?
A. He had to give me the papers. I couldn't lay my hands on them.
Q. What papers did he give you?
A. He showed me all the books and records he had w-ere permits were held.
Q. What books and records did they have?
A. Everything in their possession.
Q. What were they?
A. I don't know what they were, papers where people held permits.
A. How many employes or clerks were there at that office 1107 Broadway, at that time?
Q. Do you mean agents?
Q. Yes.
A. Probably one hundred or more.
[fol. 18] Q. And do you know how big the files were in that office?
A. We have a special department for files.
Q. Do they keep special books there where the permits are recorded?
A. I don't know how the books are kept. I go there for information.
Q. And you ask the Clerk whether such and such a person had a permit?
A. Not such a person, but the premises. I didn't know at that time whether Steel had a permit or not or owned the place or not. I asked for the premises.
Q. Whom did you ask?
A. I asked the clerk.
Q. So the clerk made the search, you didn't make it?
A. He brought the papers in front of me. I call that making a search. I don't know the name of the clerk, there are so many clerks there. I remember testifying before United States Commissioner Hitchcock in this proceeding on the search warrant.
Q. Do you remember saying anything to the Commissioner about making a search at the prohibition office for a permit?
A. I don't remember whether I did, but I remember I looked over the records.

Q. You knew it was important to find out whether there was a permit at this address?

A. I did.

Q. And you knew that you were not competent to make the search?

A. Where?

Q. At the prohibition office, didn't you?

Mr. Siegel: I object to the materiality of this line of questioning.

Mr. Kraushaar: A question of credibility.

Q. 'A search of the records of the Federal Prohibition Commissioner's office fails to disclose any permit for the manufacture or sale of intoxicating liquors above referred to.'

A. That is true.

Q. Did you make the search personally yourself?

A. I did.

Q. Why didn't you say so in this affidavit?

A. I had to go to the clerk to give me the papers and look them over. I had no right to go and put my hands on them. I had to ask for them.

Q. You didn't make the search, but the search was made by one of the clerks in the office?

A. I had to ask the clerk for it and he showed me the papers and I looked at them.

Q. Why didn't you say in your affidavit here the search was made? [fol. 19] A. It was not necessary. I didn't see whether the wagon left the premises before I went down to make this affidavit for a search warrant. I couldn't say whether the wagon remained there or not. I didn't see the wagon when I came back there. I never saw that wagon again. I couldn't tell who was driving that wagon. I don't know whether the carrier, the man who was driving that wagon, was authorized to carry it. I didn't know whether the goods were being legally or illegally transported at that time. I knew it after that time.

Q. You didn't see these very same cases again that were stencilled whiskey?

A. One case I found on the elevator. That case was, maybe.

Q. You didn't see it in any part of the building called the garage?

A. I recognized one case.

By the Court:

Q. Was this elevator in or out of the garage?

A. This elevator——

Q. Was it part of the garage building?

A. Yes, sir, right in the center of the garage, very large elevator.

By Mr. Kraushaar:

The box I found was an empty box. There were some people living in that building, I believe on the third floor. This fellow Smith told me that he lives there, the fellow that I met first when I entered

the garage. I didn't see a kitchen there, I saw a litle room. I don't know whether I would call it a kitchen or not. I did see kitchen untensils there and I did see a table there. I don't recollect whether I saw any plates or spoons. I don't recollect that.

Q. So that at the time you obtained the search warrant there were some people living in this building to all appearances?

A. I wouldn't call it a residence. Smith was stopping there with a certain woman.

Q. Do you know whether it was his wife?

A. He didn't show me his certificate, I don't know.

Q. Didn't he tell you it was his wife?

A. I don't know.

Q. Mr. Einstein, didn't you testify before the Commissioner as follows:

"Didn't you find any beds in the building?

"A. I saw a cot.

"Q. How many cots?

"A. One

"Q. Did you see a kitchen in the building?" and you answered 'no, sir.'

Is that correct?

A. When did I answer this?

Q. Do you remember whether you testified——

A. You didn't ask me now about any cots at all.

[fol. 20] The Court: You are now being asked whether you so testified before the Commissioner.

The Witness: If it is on the record, I so testified.

Q. Can you remember if you so testified, do you remember you were asked the question, "Did you see a kitchen in the building," and you answered "No, sir"—did you so testify?

A. I don't remember if I did or not.

Q. You remember you were asked this question: "Did you go into the room where the cot was," and you answered "I did"?

A. If I so testified, it must be so.

Q. In that room where you saw the cot you also saw the cooking utensils, didn't you?

A. I testified I did.

Q. Do you remember my asking you before the United States Commissioner: "Didn't you see any kitchen utensils there," and you answered, "I didn't pay no attention"?

A. Maybe I did.

Q. Were you telling the truth before the Commission when you said you didn't pay attention?

A. Yes, I did.

Q. Are you telling the truth now when you say you did see cooking utensils there?

A. Well, it came to my memory that I saw a couple of frying pans or table or something else.

Q. Did you see spoons?

A. I don't remember if I did.

Q. Didn't you testify before the United States Commissioner, didn't you see any plates or spoons there or anything like that, and you answered, "I was looking for whiskey, I was not looking for spoons"?

A. I so testified.

Q. Before you obtained the search warrant all you knew about this place was that the lower portion of the building was used as a garage; isn't that so, Mr. Einstein?

A. It is not so.

Q. You didn't see any of the upper part of this building before you obtained the search warrant?

A. I testified here before that the whole building was not a private residence, the entire building was used for business purposes.

Q. Mr. Einstein, see if I cannot get you to answer questions correctly; you had never been in this building before you obtained the warrant?

A. No, sir.

Q. All you knew about the building was what you observed by looking through the garage on the ground floor?

A. Standing on the street and observing from the outside. I have already testified that I could not see any part of the interior of the building by looking at it from the outside, except the lower part.

[fol. 21] Q. But the second and third floors, you couldn't see the interior?

A. I couldn't see the interior, but just the appearance from the outside.

I didn't know whether there was any stove or stoves used in connection with the garage at the time I obtained the search warrant. I didn't know whether or not the garage had any store room, container, receptacle, basement or sub-cellar used in connection therewith. I didn't know that it had any room or rooms which were used in connection with the garage other than the garage itself, yet I allowed the Commissioner to issue a search warrant which gave me the right to search, not only the garage, but every other part of that building.

Mr. Kraushaar: I ask that the testimony of this agent, as well as that given by Agent Smith, be suppressed on the ground that there was no proof before the United States Commissioner of reasonable and proper cause for the issuance of the search warrant and upon the further ground that it appears now conclusively by the admissions made by this witness that this affidavit was not based upon reasonable and proper cause, but upon mere conjecture, surmise and suspicion. It appears here now conclusively that he did not know the contents of these cases stencilled whiskey, that it was a mere surmise or suspicion as to what they contained, and a mere guess; that upon the testimony of this witness the Commissioner only had the right to issue a search for the garage itself and had no authority to search any other part of that building; and on the further ground it appears that no part of the liquor was seized in the part which the witnesses saw, but in an entirely different part of the building.

The Court: Motion denied.
Mr. Kraushaar: Exception.

The Witness: The liquor I found was not found in the garage at all, it was only an empty case which I found on the elevator.

Q. Some of it was found on the very floor where this cot and these cooking utensils were?

A. On the same floor, one large space. There is no adjoining rooms; this is one large room.

Q. There was no garage on the first floor, was there?

A. There was an empty space, a loft, I would call it, not a room. I saw some things piled up there, but there was no residence of any kind.

Q. The first floor was used for storage purposes?

A. I don't know what was there.

Q. What floor was the dwelling quarters?

A. On the second floor of the garage we found 92 bags of whiskey.

[fol. 22] Q. Is that the floor in which the dwelling quarters were?

A. I never saw any dwelling quarters at all.

Q. Was that the floor on which the cot and cooking utensils were?

A. I saw cots but no dwelling of any kind. That was the floor on which I found some whiskey I am not able to identify this picture. Maybe I did identify this picture before the United States Commissioner, but I am not able just now to identify it.

Q. Do you mean to tell this Court you cannot identify this as a photograph of the building at the time you made the search?

A. It may be the building but there may be some changes at this time.

Q. Look at this photograph and tell the jury wherein there were any changes in that building?

A. I am not able to identify this just now.

Q. For what reason?

A. No reason; I can't.

Mr. Kraushaar: I move that it be marked for identification.

(Marked Defendant's Exhibit C for identification.)

Q. Was this sign Indian Auto truck service, Indian Head Storage Warehouse on that building at the time you obtained the search warrant?

A. I didn't notice any signs of any kind at that time. I was only looking for the number of the building.

Q. Where did you get the number of the building from?

A. From the building.

Q. Didn't you get it from this Sign Indian Head Autotruck Service, Indian Head Storage Warehouse, 611–609?

A. I don't remember, but I remember getting the number of the building. I don't remember whether this was on it or not.

Q. Do you remember testifying then before the United States Commissioner on this point as follows:——

The Court: Is that presented in order that his credibility may be attacked?

Mr. Kraushaar: Yes, your Honor, and also on the question whether he obtained the search warrant in good faith and whether the search was reasonable and proper.

Q. I ask you to look at this photograph and I show you a photo of curtains on the second floor; did you see these curtains at the time you made your application for the search warrant?

A. I did not.

Q. Didn't notice that?

A. I did not.

Q. Still you say you examined this building very carefully before you went down to make application for a search warrant?

A. I looked it over.

[fol. 23] Q. You gave it the once-over?

A. I was standing there just across the street from the garage.

Q. And yet you won't tell this jury whether this sign was on the building at that time?

A. I don't remember seeing the sign.

Q. But you are positive when you went to make the application for the search warrant, you were positive that this building was used for business purposes only?

A. I didn't see no sign of residence.

Q. So you assumed it was used for business purposes?

A. Yes, sir.

Moe Smith recalled.

By Mr. Siegel:

Q. Do you remember whether that is the building you visted, Mr. Smith, in December, 1922?

A. It resembles the building with the exception that the day we were there I don't remember anything about these curtains and these two numbers, 609—which was in-cribed on there after we had left there. It seems these were made in there by some chalk marks. That was not there the day we made the seizure—611 and 609.

The Court: Was the sign Indian Head on there?

The Witness: I don't really know. I believe it was there.

By Mr. Kraushaar:

Q. Do you remember testifying before the United States Commissioner as follows, Mr. Smith: The sign Indian Head, Auto-truck Indian Head Storage Warehouse, 609–611 was there at that time, and you answered, "I believe it was"?

A. I still say I believe it was, but I am not positive, but I think since then I was in that locality and I observed that sign on that building.

Q. The building doesn't exist any more, does it?
A. I don't know whether it does.

Mr. Kraushaar: I offer the picture in evidence.
Mr. Siegel: I object to it. Proof of the photograph must be that it is a full and fair representation.
The Court: Objection overruled. Received in evidence, the jury to give such weight to it as is justified by the identification of the two witnesses for the Government.

(Marked Defendant's Exhibit C.)

[fol. 24] Mr. Kraushaar: I will not dispute that what the Government said they found in the premises was intoxicating beverages containing more than one half of one per cent of alcohol by volume.

At the conclusion of the Government's case, the defendant rested and made the following motion to dismiss the information:

MOTION TO DISMISS INFORMATION AND ORDER DENYING SAME

Mr. Kraushaar: Now, if your Honor pleases, I move to dismiss the information. I have not read the information as yet, but I understand it was a simple charge of possession. I move to dismiss the information and ask your Honor to direct a verdict of acquittal on the ground it now conclusively appears that the evidence upon which this information was based was secured upon a search warrant which was void, in violation of the constitutional rights of the defendant, and that the evidence was therefore illegal and improper.
The Court: Motion denied.
Mr. Kraushaar: Exception.
I think it would be a useless effort on the part of my adversary and myself to sum up this case to the jury.

(Summation waived.)

CHARGE TO JURY

Thereupon the Court charged the jury as follows:

The Court: Mr. Foreman and gentlemen of the jury: The issue which you have to determine in this case is exceedingly simple, and you are called upon to do no more than to determine whether you accept the testimony of Agents Einstein and Smith that on the 6th day of December, 1922, they called at the premises known as 611 West 46th Street and there found a large quantity of intoxicating liquor, those premises being used as a garage and for storage purposes, among other purposes and therefore that upon petition of the agents, as the testimony discloses, if accepted, met the defendant Steel and Steel stated that the liquor belonged to him. If you accept this as being true, then, gentlemen, there is no escape from finding that the Government has established its case by a fair pre-

ponderance of evidence, because possession such as is established by testimony in this Court is the kind of possesion which the law under which this prosecution is conducted forbids and makes illegal. You are not, gentlemen, to take any cognizance of the fact that the defendant did not testify. In a criminal prosecution a defendant is not required to testify, and a jury may not, under our system of law, draw any unfavorable inference against him by reason of the fact that he does not offer himself as a witness. That circumstance must be eliminated entirely from your consideration, and you have [fol. 25] only to determine whether or not the charge the Government makes against this defendant, namely that on the 6th of December, 1922, he had possession of intoxicating liquor in a manner prohibited by law, has been proved beyond a reasonable doubt.

The Court desires to make it perfectly clear to you that such possession as is indicated by the statute, does not require any actual physical possession of the intoxicating liquor; that one may, under the law and under the well settled decisions by which this Court is bound, have liquor in his possession, if it is in premises forbidden by law, owned or controlled by him under such conditions as the law says is illegal, and this, gentlemen, if you accept the testimony given by the two witnesses for the Government, is such possession as is forbidden by law, and if the testimony is accepted, your verdict must be in accordance with the charge, guilty of the crime charged by the indictment.

COLLOQUY BETWEEN COURT AND COUNSEL

Has the defendant any exceptions to the charge?

Mr. Kraushaar: Exception. I think your Honor did use the statement that the Government must prove the case by a fair preponderance of the evidence. I think that was inadvertent.

The Court: If that was the expression used, it is withdrawn. The Government must prove its case beyond a reasonable doubt. That expression does not mean by an absolute certainty, and beyond all possible doubt, but simply must present to you proof in the acceptance of which the jury finds itself with no uneasiness of mind.

Mr. Kraushaar: I ask your Honor to submit as a question of fact to the jury the following, that it may find that the search made by Isidore Einstein and his associate, Mr. Smith, was unreasonable, they have a right to disregard the entire testimony.

The Court: Have you authority for that request?

Mr. Kraushaar: I haven't on hand, but I think I have a right to make it.

The Court: Request denied. That is not in the case.

Mr. Kraushaar: Exception. I ask your Honor to charge the jury that if they find from the evidence that Einstein had no reasonable or probable cause to believe that the premises on 46th Street contained intoxicating liquor in violation of the National Prohibition Act, and if they believe that the affidavit upon which the search warrant was actually issued was based upon mere surmise or sus-

picion or conjecture, they have a right to disregard his entire testi-
[fol. 26] mony and that of the Agent Smith.

The Court: Motion denied. That is not in this case at all so far as you gentlemen are to consider it.

Mr. Kraushaar: I except. I also ask your Honor to charge the jury that if the warrant in this case—if they believe the warrant in this case did not particularly describe the place to be searched and the persons or things to be seized, they have a right to disregard the entire testimony of Agents Smith and Einstein who made the search.

The Court: Motion denied.

Mr. Kraushaar: Exception. I ask your Honor to charge the jury as a matter of law, that if they believed that any of the provisions of Articles 4 and 5 of the Constitution of the United States have been violated by this search and seizure, they have a right to disregard the entire testimony of the agents for the Government and acquit the defendant.

The Court: Motion denied.

Mr. Kraushaar: Exception.

The Court: Has the Government any requests?

Mr. Siegel: No requests.

(The jury retired.)

(Upon returning to the courtroom the following proceedings were had:)

VERDICT

The Clerk: Mr. Foreman, and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How say you, sir?

The Foreman: We find the defendant guilty as charged.

The Clerk: Mr. Foreman and gentlemen of the jury, listen to your verdict as it stands recorded, you say you find the defendant guilty as charged and so say you all?

The defendant thereupon moved the Court to set aside the verdict and grant a new trial, as follows:

MOTION TO SET ASIDE VERDICT AND FOR A NEW TRIAL

Mr. Kraushaar: I move to set aside the verdict on the ground it is contrary to law, on the exceptions taken at the trial, and I move for an arrest of judgment upon these grounds, and upon the
[fol. 27] further ground it appears from the evidence in the case that the evidence secured by the Government was in violation of the defendant's constitutional rights, in violation of the 4th and 5th amendments to the constitution, in violation of the Espionage Act, and in violation of the National Prohibition Act which restricts the use of search warrants.

The Court overruled the motion, to which ruling the defendant duly excepted, as follows:

The Court: It appears to the Court that the reasonable determination of this matter will be as follows: I desire to allow the defendant an ample opportunity to submit in proper form his conclusions with respect to the legality of the rulings made during this trial. It seems to me it should be unnecessary to bring the defendant here again. I mean by that, I think that these motions can be denied, sentence imposed, the defendant continued on the same bail, if the Government has no objection, and a stay of execution granted and the term extended two or three months to allow you gentlemen to give me your views in briefs in order that this Court may set aside this conviction if this Court has acted illegally.

Mr. Kraushaar: Will your Honor take up the questions that were argued before Judge Winslow?

The Court: I think it is unlikely that I should take up the questions decided by Judge Winslow. These motions are denied. The judgment of the Court is that the defendant pay a fine of $500; that there be a stay of sentence, of execution of the sentence; that the defendant may take an appeal if he desires, or may apply to a Justice of the Supreme Court for a stay. The term is extended six months and the Court will expect counsel for the defendant within two weeks to submit a brief in connection with the statement by the Court that the Court would reconsider its action in denying these motions in the event it was persuaded its judgment was incorrect.

JUDGMENT

Thereupon the Court entered judgment upon the verdict and sentenced the defendant to pay a fine of Five Hundred Dollars ($500) to which ruling and judgment of the Court, the defendant by his counsel then and there duly excepted.

Government's Exhibit 1 for identification, bottle of whiskey.

DEFENDANT'S EXHIBIT A

Affidavit for Search Warrant

[fol. 28] SOUTHERN DISTRICT OF NEW YORK, ss:

Isidor Einstein being duly sworn, deposes and says: I am a General Prohibition Agent assigned to duty in the State of New York. On December 6, 1922, at about 10 o'clock A. M. accompanied by Agent Moe W. Smith, I was standing in front of the garage located in the building at 611 West 46th Street, Borough of Manhattan, City and Southern District of New York. This building is used for business purposes only. I saw a small truck driven into the entrance of the garage and I saw the driver unload from the end of the truck a number of cases stencilled whiskey. They were the size

and appearance of whiskey cases and I believe that they contained whiskey.

A search of the records of the Federal Prohibition Director's office fails to disclose any permit for the manufacture, sale or possession of intoxicating liquors at the premises above referred to.

The said premises are within the Southern District of New York and upon information and belief, have thereon a quantity of intoxicating liquor containing more than one-half of one per cent of alcohol by volume, and fit for use for beverage purposes, which is used, has been used and is intended for use in violation of the Statute of the United States, to wit, the National Prohibition Act.

This affidavit is made to procure a search warrant, to search said building at the above address, any building or rooms connected or used in connection with said garage, the basement or sub-cellar beneath the same, and to seize all intoxicating liquors found therein.

Isidor Einstein.

Sworn to before me this 6th day of December, 1922. Sam'l M. Hitchcock, U. S. Commissioner, Southern District of New York.

Search Warrant

The President of the United States of America to Isidor Einstein, General Prohibition Agent:

Whereas, it appears from the affidavit of said Isidor Einstein that certain intoxicating liquor containing more than ½ of 1% of alcohol by volume and fit for use for beverage purposes is unlawfully held and possessed in a certain garage located in the four-story building at 611 West 46th Street, Borough of Manhattan, City, and Southern District of New York, said building being used for business [fol. 29] purposes only—and in any safe or desk, store room, container, receptacle, basement or sub-cellar, building, room or rooms connected or used in connection with said garage; and that said liquor is used and is intended for use and has been used in violation of Title II of the National Prohibition Act in that said liquor was and is wilfully, knowingly and unlawfully held in said premises.

Now, therefore, you are hereby commanded in the name of the President of the United States, in the day time only, to enter the said premises, and then and there to search diligently for said liquor, and if the same or any part thereof shall be found on said premises, then you are hereby authorized and commanded to seize and secure the same and to make a return of your doings to the undersigned within ten days from the date hereof.

You are likewise commanded in the event you seize or take said liquor under the warrant to give a copy of this warrant, together with a receipt for the liquor taken, (specifying it in detail) to the person from whom it is taken by you, or in whose possession it is found, or in the absence of any person to leave a copy of this war-

rant, with the receipt as aforesaid, in the place where said liquor is found.

Immediately upon execution of this warrant you are commanded further to forthwith return the warrant to the undersigned, and to deliver to him a written inventory of the liquor taken, duly made and verified by you.

Given under my hand and seal this 6th day of December, 1922.

Sam'l M. Hitchcock, United States Commissioner for the Southern District of New York.

DEFENDANT'S EXHIBIT B

Inventory

N. Y. C., December 6/22.

Taken from Premises Designated in Search Warrant

150 cases whiskey.
92 Bags whiskey.
1 5 gallon can of alcohol.
6 5 gallon jugs whiskey.
33 cases of gin.
102 quarts whiskey.
2 50 gallon Barrels of whiskey.
1 corking machine.

Isidor Einstein, General Agent.

[fol. 30] Defendant's Exhibit C, photograph.

ORDER SETTLING BILL OF EXCEPTIONS

This is to certify that the foregoing bill of exceptions tendered by the defendant is correct in every particular and is hereby settled and allowed and made a part of the record in this cause.

Done in open Court this 18th day of August, 1924.

Edwin L. Garvin, United States District Judge.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between counsel for the defendant and the United States Attorney that the foregoing bill of exceptions is correct in every particular, and that the same may be settled and allowed and made a part of the record of this

cause, and that an order to this effect may be entered without further notice.

Dated New York, April —, 1924.

(Sgnd.) William Hayward, United States Attorney. Meyer Kraushaar, Counsel for Defendant.

[fol. 32] In United States District Court

[Title omitted]

Commitment—May 7, 1924

U. S. Criminal Code.—Wilfully and knowingly — unlawfully transport a certain quantity of intoxicating liquor which contained more than one-half of one percent of alcohol by volume and was then and there fit for use for beverage purposes. Act of Oct. 28, 1919.

On motion of the United States Attorney, ordered sentence.

The Court thereupon proceeded to pass judgment, and sentenced the prisoner, John Steel to pay a fine of Five Hundred Dollars and to stand commit-ed until fine be paid or he is otherwise discharged according to law.

Sentence to be executed at the N. Y. City Prison.

Bail continued pending appeal to U. S. Supreme Court.

Defendant remanded to custody of U. S. Marshal to execute sentence.

Edwin L. Garvin, Mar. 31, 1924.

An extract from the Minutes. 4, 1, '24. Fine paid.
Alex. Gilchrist, Jr., Clerk. (Seal Alex. Gilchrist, Jr.)

I hereby certify that, in compliance with the directions contained in the within Commitment, Mar. 31, 1924, I delivered the body of —— —— to the Warden of ——, at ——, as herein directed.
Wm. C. Hecht, U. S. Marshal, S. D. N. Y.

Dated New York, —— —, ——.

[fol. 33] In United States District Court

[Title omitted]

Order Allowing Writ of Error

This 4th day of April, 1924, comes the defendant by his attorney and files herein and presents to the Court his petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by him, praying also that a transcript of the

record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof,

Let a writ of error issue from the Supreme Court of the United States to the United States District Court for the Southern District of New York, prayed for in the petition of the defendant John F. Steele, and that a citation be issued to the defendant-in-error, the United States of America.

Edwin L. Garvin, United States District Judge.

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR

To Hon. Edwin L. Garvin, Judge of the United States District Court for the Southern District of New York:

Now comes John F. Steele, defendant in the above entitled cause, feeling himself aggrieved by the verdict of the jury in the United States District Court for the Southern District of New York, entered on the 12th day of March, 1924, hereby petitions for an order allowing him, the said defendant, to prosecute a writ of error to the Supreme Court of the United States from the United States District Court for the Southern District of New York.

Assignments of error are filed with this petition.

Meyer Kraushaar, Solicitor and Attorney for Defendant.

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

Now comes John F. Steele, the plaintiff in error in connection with his petition for a writ of error, and says that in the record, proceedings and judgment aforesaid error has intervened to his prejudice, to wit:

1. The Court erred in denying his motion to suppress the evidence given by Moe Smith, and to vacate and set aside a search warrant issued, upon which such evidence was secured, upon the ground that his constitutional rights have been invaded, because the search warrant issued by the Hon. Samuel M. Hitchcock, United States Commissioner, on the 6th day of December, 1922, for the

search of premises 611 West 46th Street, in the Borough of Manhattan, City of New York, Southern District of New York, was issued in violation of the Fourth and Fifth Amendments to the Constitution of the United States, the same not having been issued upon probable cause supported by oath or affirmation particularly describing the place to be searched or the person or thing to be seized.

2. Because the search and seizure conducted under the said search warrant was unreasonable and in violation of the Fourth Amendment to the Constitution of the United States.

3. Because the search warrant was issued in violation of the Fifth Amendment to the Constitution of the United States, on the ground that it deprived the defendant of his property without due process of law.

[fol. 36] 4. On the ground that the defendant was compelled to be a witness against himself, because the said warrant was based upon surmise and suspicion and not upon reasonable and probable cause, in violation of the provisions of the Constitution.

5. On the ground that the affidavit upon which said search warrant was issued, if the same did contain reasonable and probable cause for the issuance thereof, only permitted the search of the garage in the premises 611 West 46th Street, and the warrant was obtained to search the said premises, including any safe, desk, store room, receptacle, basement or a sub-cellar, building, room or rooms used in connection with such garage, and there was no proof either by oath or affirmation of Isidor Einstein or any other person that there was any safe or desk, room, container, receptacle, basement, sub-cellar, building, room or rooms used in connection with such garage, nor was there any proof either by oath or affirmation of reasonable cause to believe that there was any liquor in any safe, desk, storeroom, container, receptacle, basement or sub-cellar, building, room or rooms used in connection with said garage.

6. On the further ground that the search warrant was not issued to a civil officer of the United States, and that the person authorized to make such search and seizure, to wit: Isidor Einstein, was not a civil officer of the United States, authorized to make search and seizure under the statute in such case made and provided.

7. On the further ground that the said affidavit, or the oath or affirmation upon which said search warrant was based, contained no proof that Isidor Einstein was authorized by the Commissioner of Internal Revenue or any other officer of the United States to execute such warrant for search and seizure.

[fol. 37] 8. That the Court erred in refusing to suppress the evidence of said Isidor Einstein and of Moe Smith after they had testified, on the ground that it appeared from such testimony that there was no proof before the United States Commissioner of probable and reasonable cause for the issuance of a search warrant.

9. Upon the ground that it appeared conclusively from the admissions made by said witnesses on the trial that the affidavit upon which said search warrant was issued was not based upon probable cause but on mere conjecture, surmise and suspicion, and it appearing from the said testimony conclusively that they did not know the contents of the cases stencilled "whiskey;" that the said statements were mere surmise and suspicion and a mere guess.

10. On the ground that the Commissioner had a right to issue a search warrant only for the garage itself, and had no authority to issue a warrant for any other building, and that the said seizure was unreasonable because the entire premises were searched and the liquor was found in a building entirely distant from such garage.

11. On the ground that the Court erred in refusing to dimiss the information and direct a verdict of acquittal, because it appeared conclusively that the evidence upon which the information was based was secured upon a search warrant which was void as in violation of the constitutional rights of the defendant, and the evidence, therefore, was illegal and improper.

12. On the ground that the Court erred in refusing to charge the jury as requested by the defendant, as follows: "That it may find that the search made by Isidor Einstein and his associate, Mr. Smith, was unreasonable, they have a right to disregard the entire [fol. 38] testimony." Also, "That if they find from the evidence that Einstein had no reasonable or probable cause to believe that the premises on 46th Street contained intoxicating liquor in violation of the National Prohibition Act, and if they believe that the affidavit upon which the search warrant was actually issued was based upon mere surmise or suspicion or conjecture, they have a right to disregard his entire testimony and that of the Agent Smith." Further, that "If they believe the warrant in this case did not particularly describe the place to be searched and the persons or things to be seized, they have a right to disregard the entire testimony of Agents Smith and Einstein, who made the search." And, lastly, "That if they believe that any of the provisions of Articles 4 and 5 of the Constitution of the United States have been violated by this search and seizure, they have a right to disregard the entire testimony of the agents for the Government and acquit the defendant."

13. That the Court erred in making the following ruling:

"Mr. Kraushaar: I ask your Honor at this stage to examine the witness for the purpose of showing that the witness had no evidence of any kind against these premises until the search warrant was obtained.
The Court: Motion denied.
Mr. Kraushaar: Exception."

14. That the Court erred in overruling and denying the motion of the defendant in arrest of judgment.

15. That the Court erred in entering a judgment against the defendant on the verdict in this case.

16. That the judgment of the Court is contrary to law.

Wherefore the plaintiff in error prays that the judgment of the District Court of the United States for the Southern District of New York may be reversed and held at naught, etc.

Meyer Kraushaar, Solicitor and Attorney for Petitioner.

[fol. 39] CITATION—In usual form on Wm. Hayward; filed April 8, 1924; omitted in printing

---

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AND ORDER EXTENDING TIME

It is hereby stipulated and agreed by and between the United States Attorney and the attorney for the plaintiff in error, that the time of the plaintiff in error to file a transcript of the record herein, in the Office of the Clerk of the Supreme Court of the United States be and the same is hereby extended to and including the 15th day of September, 1924, and that an order to that effect may be entered without further notice, nunc pro tunc as of the 8th day of April, 1924.

Dated New York, August 25th, 1924.

William Hayward, United States Attorney. Meyer Kraushaar, Attorney for Plaintiff in Error.

So ordered. Edwin L. Garvin, United States District Judge.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated August 27th, 1924.

Meyer Kraushaar, Attorney for Defendant. William Hayward, Attorney for Complainant.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 27th day of August, in the year of our Lord one thousand nine hundred and twenty four, and of the Independence of the said United States the one hundred and forty-ninth.

Alex. Gilchrist, Jr., Clerk. (Seal of the District Court of the United States, Southern District of New York.)

Endorsed on cover: File No. 30,601. S. New York D. C. U. S. Term No. 636. John F. Steele, plaintiff in error, vs. The United States of America. Filed September 5, 1924. File No. 30,601.

INDEX.

TABLE OF CASES CITED.

Supreme Court of the United States

JOHN F. STEELE, Plaintiff-in-Error, vs. THE UNITED STATES OF AMERICA, Defendant-in-Error,	Cause No. 636 OCTOBER TERM 1924.
JOHN F. STEELE, Appellant. vs. THE UNITED STATES OF AMERICA, Defendant-in-Error,	Cause No. 235 OCTOBER TERM 1924.

BRIEF FOR APPELLANT AND PLAINTIFF-IN-ERROR.

The above-entitled causes were advanced and consolidated upon application of the appellant and plaintiff-in-error, John F. Steele.

Cause No. 235 involves an appeal to this Court from a judgment or decree of the United States District Court for the Southern District of New York, signed by Honorable Francis A. Winslow, District Judge, denying the petition of John F. Steele to vacate and set aside a search warrant and restore the property seized thereunder, and directing the same to remain in the custody of the officer by whom the same were seized or to be otherwise disposed

of according to law (p. 3). The appeal is based upon assignments of error in which, among other things, it is charged that the search warrant described in the judgment or decree was obtained in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

Cause No. 636 involves a writ of error, sued out by the said Steele (p. 1) upon his conviction for the violation of Title II of the National Prohibition Act, upon an information charging him with having unlawfully, wilfully and knowingly possessed, in the garage at 611 West 46th Street, intoxicating liquor (pp. 1, 2). The assignments of error upon which the writ was obtained also charged, among other things, a violation of the constitutional rights of the said Steele in respect to the Fourth and Fifth Amendments and also assigned other grounds of error which will be referred to below.

The appeal and writ of error is taken direct to this Court, under the provisions of Section 238 of the Judicial Code, on the ground that these causes involve the construction or application of the Constitution of the United States. We take it that once this Court acquires jurisdiction, it has the power to decide every other question arising in the case (*Pierce* v. *U. S.*, 252 U. S. 239). For these reasons, there will be also brought up for review in this Court other questions, including those involving construction and interpretation of the provisions of the National Prohibition Act and the Espionage Act relating to searches and seizures.

Statement of the Case.

THE FACTS OF CAUSE NO. 235.

The facts are, as they were developed in case No. 235, briefly as follows: On December 6, 1922, one Isidor Einstein laid before Samuel M. Hitchcock, United States Commissioner for the Southern District of New York, an affidavit which reads as follows:

"SOUTHERN DISTRICT OF NEW YORK, ss.:

ISIDOR EINSTEIN, being duly sworn, deposes and says: I am a General Prohibition Agent assigned to duty in the State of New York. On December 6, 1922, at about 10 o'clock A. M., accompanied by Agent Moe W. Smith, I was standing in front of the garage located in the building at 611 West 46th Street, Borough of Manhattan, City and Southern District of New York. This building is used for business purposes only. I saw a small truck driven into the entrance of the garage and I saw the driver unload from the end of the truck a number of cases stencilled whiskey. They were the size and appearance of whiskey cases and I believe that they contained whiskey.

A search of the records of the Federal Prohibition Director's office fails to disclose any permit for the manufacture, sale or possession of intoxicating liquors at the premises above referred to.

The said premises are within the Southern District of New York and, upon information and belief, have thereon a quantity of intoxicating liquor containing more than one-half of one per cent. of alcohol by volume, and fit for use for beverage purposes, which

is used, has been used and is intended for use in violation of the Statute of the United States, to wit, the National Prohibition Act.

This affidavit is made to procure a search warrant, to search said building at the above address, any building or rooms connected or used in connection with said garage, the basement or sub-cellar beneath the same, and to seize all intoxicating liquors found thereon.

ISIDOR EINSTEIN."

On the same day, upon this affidavit, the United States Commissioner issued a search warrant which reads as follows:

"The President of the United States of America to Isidor Einstein, General Prohibition Agent:

Whereas, It appears from the affidavit of said Isidor Einstein that certain intoxicating liquor containing more than ½ of 1% of alcohol by volume and fit for use for beverage purposes is unlawfully held and possessed in a certain garage located in the four-story building at 611 West 46th Street, Borough of Manhattan, City and Southern District of New York, said building being used for business purposes only—and in any safe or desk, store room, container, receptacle, basement or sub-cellar, building, room or rooms connected or used in connection with said garage; and that said liquor is used and is intended for use and has been used in violation of Title II of the National Prohibition Act in that said liquor was and is wilfully, knowingly and unlawfully held in said premises.

Now, Therefore, you are hereby commanded in the name of the President of the United States, in the day time only, to enter the said premises, and then and there to

search diligently for said liquor, and if the same or any part thereof shall be found on said premises, then you are hereby authorized and commanded to seize and secure the same and to make a return of your doings to the undersigned within ten days from the date hereof.

You are likewise commanded in the event you seize or take said liquor under the warrant to give a copy of this warrant together with a receipt for the liquor taken (specifying it in detail), to the person from whom it is taken by you, or in whose possession it is found, or in the absence of any person to leave a copy of this warrant, with the receipt as aforesaid, in the place where said liquor is found.

Immediately upon execution of this warrant you are commanded further to forthwith return the warrant to the undersigned, and to deliver to him a written inventory of the liquor taken, duly made and verified by you.

Given under my hand and seal this 6th day of December, 1922.

SAMUEL M. HITCHCOCK,
United States Commissioner for the
Southern District of New York."

The warrant was returned to the United States Commissioner bearing the following endorsement:

"New York, Dec. 6, 1922. 150 cases whiskey, 92 bags of whiskey, 1 5 gallon can of alcohol, 6 5 gallon jugs of whiskey, 33 cases of gin, 102 quarts whiskey, 2 50 gallon barrels of whiskey, 1 corking machine.

ISIDOR EINSTEIN,
General Agents."

This endorsement was presumably intended to comply with the requirement of the statute with respect to the return necessary by the officer executing the same.

After the warrant, bearing this endorsement, was returned to the United States Commissioner, an affidavit was filed by Steele in which he claimed the warrant directed the search to be made of a certain garage in the four-story building at 611 West 46th Street, New York City; that the intoxicating liquor which was seized was seized in 609 West 46th Street, New York City, which is a separate and distinct building from the one described in the warrant, to wit, 611 West 46th Street, New York City; that the buildings were separated by a common party wall; that the lower portion of the building was used as a garage and part of the upper floors were used for storage (No. 235, fol. 18); that he himself resided in part of the building at 609 West 46th Street; that his right to the liquor complained of was legal because possessed in a private dwelling.

Upon the filing of this affidavit, a hearing was had before the United States Commissioner, in which the relator moved to vacate and quash the warrant on the grounds that the same failed to comply with the provisions of the Espionage Act and that the search was clearly in violation of his constitutional rights (see argument of counsel, fols. 23-30, pp. 10-13, No. 235).

Upon the denial of petitioner's motion testimony was taken by the Commissioner. Einstein, who secured the warrant, testified, in effect, that on December 6th he went to premises 609 West 46th Street with one Moe Smith; that the building

had the appearance of a garage. He faced the entrance and saw a small truck drive in and a man unknown to him step off; that he saw a number of cases being unloaded; that he was at a distance of about 25 or 30 feet away (fol. 32); that the cases were marked whiskey (fol. 33); that he went to the Prohibition Office to determine whether a permit existed for the premises; that he found none (fol. 33); that he thereafter applied to the United States Commissioner for a search warrant, which was secured; that he thereupon returned to the premises and went to the place where the liquor was unloaded, on the street floor, *and found nothing.* He went up on the elevator two floors and saw two or three men filling up bottles of whiskey and "bagging the same" (fols. 37, 38); that he found 92 bags, 150 cases in a room on that floor; that Steele thereafter appeared on the scene and he served a copy of the warrant on him (fol. 43). On cross-examination he admitted that he had *never been in the building before obtaining a warrant or search thereunder* (fol. 49) and had no personal knowledge of the nature of the use or occupancy of the building with the exception of the ground floor, in which he saw the vehicle enter.

Moe Smith, who assisted him in the search, testified that he observed a small motor truck enter the garage; that he did not have the building under observation all the time he was there (fol. 70), but when Einstein returned with a warrant they, together, entered the premises. He testified that when he entered the premises he was confronted by another man name Smith who claimed to be a caretaker; that despite Smith's objection, he insisted upon searching the entire building; that on the

first floor *he found nothing at all.* He then asked Smith to take him up in the elevator to the rear of the building and on the second floor and testified "we got off and there is an opening which led into another part where there was three men who were filling bottles of amber colored fluid from filters and jugs. These men were in an enclosure. I should guess the enclosure was about twenty-five feet, partitioned off in this here building, and this was on the 611 side." There he found a corking and whiskey bottling machine and other quantities of whiskey and liquor (fol. 72). On the floor above he found 92 bags of whiskey and 150 cases (fol. 73). On cross-examination he admitted that he *had not seen any boxes with any whiskey stencil marks;* that he was not with Agent Einstein, who claims to have seen it (fol. 77); that he had never been inside the building—did not know what the building contained—prior to the search, with the exception of the ground floor which he had peered into from the street (fol. 77); that the house had two numbers, 609 and 611 (fol. 76); that prior to the search he did not know whether it was one or two buildings, although the garage was one large floor without any partitions and was contained in both parts of the building which was known as 609-611 (fol. 77). He admitted that the building *contained living rooms on the side known as 609, which is the side on which the whiskey was found. He admitted that the second floor of the premises was not used as a garage but as a storage room* (fol. 83).

After the testimony of these agents was given appellant moved to vacate the search warrant on the ground that it affirmatively appeared that the

agents not only searched the garage but other floors in the building; that there was no proof before the Commissioner at the time the warrant was issued to show that the upper floors had any connection with the garage and, as a matter of fact, it appeared affirmatively that such upper floors, in which the liquor was found, were not used as a garage at all (fol. 88).

The appellant testified that he resided in the premises, had his meals there; that 609 and *611 were two separate buildings.* The lower floor, however, was not divided, although there were pillars, in lieu of partition walls, on the ground floor; that the upper stories of the building were used by various tenants; that a portion of the premises known as 609 was used by him (fol. 95); that the upper floors of both buildings were divided by wooden partitions (fol. 97); that the liquor in question belonged to him (fol. 95).

The United States Commissioner denied the appellant's petition to vacate the search warrant (fol. 102). He thereupon moved the District Court upon a written petition claiming that the search warrant was unreasonable, unlawful and violative of his constitutional rights and asked that the warrant be vacated and the property seized returned to him (pp. 4-6). The District Judge denied said application on the ground that there was probable cause for believing the existence of grounds on which the warrant was issued and directed that the property remain in the custody of the officer by whom the same was seized or be otherwise disposed of according to law (p. 3).

THE FACTS OF CAUSE NO. 636.

The Untied States Attorrey thereupon filed an information against Steele, charging him with violating the National Prohibition Act, by unlawfully possessing a quantity of intoxicating liquor, seized under the search warrant above described (No. 636, p. 1). Upon Steele's plea of not guilty, the cause was brought on for trial before Honorable Edwin L. Garvin, District Judge.

At the outset counsel for the defendant moved that the trial of the action be stayed pending the final adjudication of the appeal in No. 235, which was then pending in this Court. This application the Court denied.

In opening the case before the jury, the United States Attorney called the Court's attention to the fact that the evidence upon which the defendant was sought to be convicted was obtained upon the search warrant above referred to. Thereupon, counsel moved to suppress the testimony because the search warrant was not issued upon probable cause supported by oath or affirmation, particularly describing the place to be searched and the person or things to be seized; and that the warrant was obtained upon surmise and suspicion; also on the further ground that the person making such search was not properly authorized so to do, because he was not a civil officer of the United States, in accordance with the statute in such case made and provided.

The argument of counsel may be found at pages 4, 5 and 6 of the record.

The Trial Judge denied said application and the defendant duly excepted (fol. 6). Smith then took the stand and testified, in effect, that he had

searched the premises upon a search warrant and that he found nothing on the main floor; that on the second floor he entered a room in which he found three men bottling what he later found was whiskey; that later the defendant came in and stated that he was the lessee of the entire building, paying $780 rent therefor; that he told him that this was the first time he was handling liquor; that he was only "in the liquor game a short time"; that he placed the defendant under arrest (pp. 7 and 8). On cross examination he testified that he had never entered the premises before the search was made but that he acted under the search warrant which Einstein and he had obtained, in making the search. He admitted that *part of the premises* were used for a dwelling, in a room entirely partitioned off (fol. 12).

Einstein told a similar story (pp. 10 and 11) and on cross-examination admitted that he had never been inside the premises before making the search (p. 14); that he did not know whether the cases stencilled whiskey which he saw unloaded were filled or empty (p. 16); that *he had never examined them and never suspected that they contained whiskey* (p. 14). *He finally stated that he concluded that the boxes contained whiskey because they were so stencilled* (p. 17). His testimony makes very interesting reading; but it will serve no useful purpose to subject the same to further analysis. It is important to note, however, that he admitted that he could not see the interior of the building before he secured the warrant and that his affidavit was based upon his observation of the building from the outside (fol. 21). Again, counsel moved to suppress the testimony of Einstein on the grounds already stated (fol. 21).

At the conclusion of the trial, appellant again moved to dismiss the information on the ground that it conclusively appeared that the evidence upon which the information was based was secured upon a search warrant which was void and in violation of his constitutional rights. The motion being denied, the defendant excepted (fol. 21).

Defendant's counsel requested that the Court charge the jury as follows:

> "Mr. Kraushaar: I ask your Honor to submit as a question of fact to the jury the following: that it may find that the search made by Isidore Einstein and his associate, Mr. Smith, was unreasonable, they have a right to disregard the entire testimony.
>
> The Court: Have you authority for that request?
>
> Mr. Kraushaar: I haven't on hand, but I think I have a right to make it.
>
> The Court: Request denied. That is not in the case.
>
> Mr. Kraushaar: Exception. I ask your Honor to charge the jury that if they find from the evidence that Einstein had no reasonable or probable cause to believe that the premises on 46th Street contained intoxicating liquor in violation of the National Prohibition Act, and if they believe that the affidavit upon which the search warrant was actually issued was based upon mere surmise or suspicion or conjecture, they have a right to disregard his entire testimony and that of the Agent Smith.
>
> The Court: Motion denied. That is not in this case at all so far as you gentlemen are to consider it.
>
> Mr. Kraushaar: I except. I also ask your Honor to charge the jury that if the

warrant in this case—if they believe the warrant in this case did not particularly describe the place to be searched and the person or things to be seized, they have a right to disregard the entire testimony of Agents Smith and Einstein who made the search.

The Court: Motion denied.

Mr. Kraushaar: Exception. I ask your Honor to charge the jury as a matter of law, that if they believed that any of the provisions of Articles 4 and 5 of the Constitution of the United States have been violated by this search and seizure, they have a right to disregard the entire testimony of the agents for the Government and acquit the defendant.

The Court: Motion denied.

Mr. Kraushaar: Exception."

The assignments of error in this case may be found at pages 28 to 30, full and complete, and bring up all questions sought to be reviewed in this Court. Likewise, the assignments of error in 235 may be found at pages 4 to 6, substantially. In effect, these causes involve the following questions:

(1) Was the search warrant obtained upon reasonable and probable cause within the meaning of the constitutional provisions set forth in the Fourth and Fifth Amendments?

(2) Did the warrant particularly describe the place to be searched and the things to be seized within the meaning of the Fourth Amendment?

(3) If the warrant was deficient in these respects, was the search a violation of the constitutional rights of the appellant, John Steele?

(4) Was the Commissioner competent, under the provisions of the statutes, to issue a search warrant to a *prohibition agent, who was not a civil officer of the United States?*

(5) Did the Trial Court err in refusing to charge the jury as requested?

If the first two questions are answered in the negative by this Court, and the third question is answered in the affirmative, it must follow that the conviction of the defendant upon the evidence, secured in a manner which was unconstitutional, was erroneous; the search warrant was void and the same should be vacated and his property restored. The fourth question relates only to the validity of the conviction and if decided in our favor can only affect Cause No. 636.

POINT I.

The search and seizure was unconstitutional in that the affidavit and the warrant in pursuance of which it was directed was not based upon probable cause but upon suspicion, surmise and hearsay.

The Fourth and Fifth Amendments to the Constitution provide as follows:

> "ART. IV. The right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly de-

scribing the place to be searched, and the person or things to be seized.

ART. V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

To quote the language of Mr. Justice Day in the case of *Burdeau* v. *McDowell*, 256 U. S. 465:

> An extended consideration of the origin and purposes of these amendments would be superfluous, in view of the fact that this court has had occasion to deal with those subjects in a series of cases. *Boyd* v. *U. S.*, 116 U. S. 616; *Adams* v. *N. Y.*, 192 U. S. 585; *Weeks* v. *U. S.*, 232 U. S. 383; *Johnson* v. *U. S.*, 228 U. S. 457; *Pearlman* v. *U. S.*, 247 U. S. 7; *Silverthorn* v. *U. S.*, 251 U. S. 385; *Gouled* v. *U. S.*, 255 U. S. 298."

An interesting note on the events which brought about these amendments in the Massachusetts Law Quarterly for August, 1922, page 43, will be found in the appendix to this brief.

The brief of the plaintiff-in-error in *Gouled* v. *U. S.*, *supra*, is also of value in this connection.

The terse and pointed language of the District Court in the case of *U. S.* v. *Innelli*, 286 Fed. 731, is also of interest in this connection. The Court said:

> "This motion concerns the law of arrests, searches, and seizures. They have been made time out of mind. The power to make them is an absolutely necessary power. Experience, however, has taught us that the power is one open to abuse. The most notable historical instance of it is that of lettres de cachet. Our Constitution was framed during the seethings of the French Revolution. The thought was to make lettres de cachet impossible with us. Protective guards have in consequence been thrown around us, to lessen the harassments and violations of individual rights to which we might otherwise be subjected. Such laws are seldom intentionally violated. What usually happens is that, in the zeal to perform one duty, the other is disregarded or remains unknown. This innocence of motive, however, is no justification. The law, and all laws, must be regarded. This is expected of all good citizens. To the judges it is a special command. Let it not be forgotten that there were prohibitions in the Constitution before the Eighteenth Amendment. Among them are the Fourth and Fifth. If they afford protection to the guilty, this is the price to be paid for the general good. One prohibition is that no one shall be compelled to give evidence against himself. If anything in the possession of the accused is taken from him by unlawful force, to be used in evidence against him, it cannot be so used in violation of his rights."

The search in the instant case was made under the authority of the Act of June 15, 1917, Chapter 30, Title XI, known as the Espionage Act, as the same has been made applicable to cases involving a violation of the National Prohibition Act, by Section 2 of Title 2.

The limitations of the Constitution have been incorporated in this act by the following provisions:

> "§3. Search warrants; probable cause and affidavit.
>
> A search warrant can not be issued but *upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.*
>
> §4. Search warrant; examination of applicant and witness; affidavits and depositions.
>
> The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing, and cause them to be subscribed by the parties making them.
>
> §5. Search warrant; affidavits and depositions.
>
> The affidavits or depositions *must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.*
>
> §6. Search warrants; issue; contents.
>
> If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, *to a civil officer of the*

United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner."

Section 2, Title II of the National Prohibition Act provides as follows:

"COMMISSIONER TO REPORT VIOLATION AND UNITED STATES ATTORNEY TO PROSECUTE—Sec. 2. The Commissioner of Internal Revenue, his assistants, agents and inspectors shall investigate and report violations of this act to the United States Attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the attorney general, as in the case of other offenses against the laws of the United States; and such commissioner of internal revenue, his assistants, agents and inspectors may *swear out warrants** before the United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes of the United States is hereby

---

* Note statute reads "swear out" not "and execute or serve."

made applicable to the enforcement of this act. Officers mentioned in said section 1014 are authorized to issue search warrants *under the limitations provided* in Title XI of the act approved June 15, 1917."

We have already observed that the sole basis for the issuance of the search warrant was the affidavit of Einstein.

We contend that the facts set forth in this affidavit are insufficient to establish probable cause for believing that sufficient ground existed to believe that the garage in the premises sought to be searched was used for the purpose of illegally possessing contraband liquor.

What is meant by the expression "probable cause" as used in the constitutional amendment? The great weight of judicial opinion is in favor of the view that mere rumor, surmise, conjecture or suspicion cannot form the basis for believing the existence of probable cause.

Baund v. *South Carolina Ry. Co.*, 57 Fed. 485.

United States v. *Lai Chew*, 298 Fed. 652.

United States v. *Casino*, 286 Fed. 976.

Salata v. *United States*, 286 Fed. 125.

United States v. *Boasberg*, 283 Fed. 305.

Central Consumers Co. v. *James*, 278 Fed. 249.

United States v. *Kelih*, 272 Fed. 484.

United States v. *Armstrong*, 275 Fed. 506 (see Opinion, p. 508).

United States v. *Borowsky*, 268 Fed. 408.

United States v. *Pitotto*, 267 Fed. 603.

United States v. *Rykowsky*, 267 Fed. 866.
Veeder v. *United States*, 252 Fed 414-418.
Giles v. *United States*, 284 Fed. 208.
Ripper v. *United States*, 178 Fed. 24.
State v. *District Court* (Mont.), 198 Pac. 362.
Adams v. *Commonwealth* (Ky.), 246 S. W. 788.
Colley v. *Same* (Ky.), 243 S. W. 913.
Craft v. *Same* (Ky.), 247 S. W. 722.
Youman v. *Same*, 189 Ky. 152, 224 S. W. 860.
Ash v. *Same*, 193 Ky. 452, 236 S. W. 1032.
Colley v. *Same*, 195 Ky. 706, 243 S. W. 1032.
Terril v. *Same*, 189 Ky. 152, 224 S. W. 860.
State v. *Peterson*, 27 Wyo. 185, 194 Pac. 342.
People v. *Effelhey* (Mich.), 190 N. W. 727.
People v. *Knopka* (Mich.), 190 N. W. 731.
People v. *De Vasto* (App. Div.), 190 N. Y. S. 816.
Welles v. *People* (App. Div.), 197 N. Y. S. 758.
Cooley's Const. Limitations (4th Ed.), 372.

These Courts unanimously hold that the affidavit upon which the search warrant is obtained cannot consist of mere conclusions based on hearsay or upon information and belief, but must set forth evidentiary facts upon which such conclusions are based and, taken together, to be of such a nature that the Magistrate may be satisfied that there was

reasonable ground for believing that a crime is being or has been committed in the premises to be subjected to search and seizure.

Other Courts have taken the contrary view, and hold that hearsay may be sufficient, without even a statement of the sources from which the hearsay was derived.

Watson v. *State* (Neb.), 189 N. W. 620.
People v. *Kennedy*, 303 Ill. 423.
People v. *Schaeffer* (Wash.), 207 Pac. 220.
State v. *Kees* (W. Va.), 114 S. E. 617.
Cochran v. *State* (Ohio), 138 N. E. 54.
State v. *Boulter*, 5 Wyo. 236, 39 Pac. 883.
In re Search 15 E. 23rd Street, 284 Fed. 914.
Bookbinder v. *United States*, 287 Fed. 790, certiorari denied, 43 Sup. Ct. Rep. 523.
Bookbinder v. *United States*, 278 U. S. 216.
United States v. *Leper*, 288 Fed. 136.
Zimmerman v. *Bedford* (Va.), 115 S. E. 363. (See criticism of this opinion in 8 Va. Law Register, N. S., p. 936 *et seq.*)

The *Bookbinder* case, *supra*, involved the seizure of liquor claimed to have been smuggled into the United States and not the seizure of liquor believed to be in stock for the purpose of illicit sale. The District Court (278 Fed., at pp. 218-219), in declining to quash the search warrant, drew a distinction between these two cases, holding, by inference, that in the case of the later violation stronger evidence would be required to establish probable cause than in the case of smuggled stock, and cited among other decisions the case of *Locke*

v. *United States,* 7 Cranch. 339, a decision by Chief Justice Marshall, holding that where a libel was brought by the United States for the condemnation of merchandise claimed to have been smuggled, the *"onus probandi"* was not upon the United States to prove that the goods were smuggled but that the burden of proof lay with the claimant to establish that the goods were free from taint. The Chief Justice wrote as follows:

> "It is contended, that probable cause means *prima facie* evidence, or, in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation. This argument has been very satisfactorily answered on the part of the United States, by the observation, that this would render the provision totally inoperative. It may be added, that the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; and in all cases of seizure, has a fixed and well-known meaning. It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by congress."

This language convinces us that the term "probable cause" as used in the Revenue Statute then under consideration could not have been intended in the same sense as expressed in the constitutional limitation; for, if search warrants against persons, their houses and effects can be issued on mere suspicion or conjecture, then the constitutional amendment becomes a mere empty platitude and by construction is relegated to the museums of history, no longer to be considered one of the

palladiums of our liberty, but a mere fiction like those of the common law, which are continued only because they may mystify and impress the layman but of no practical importance. The search warrant would be similar to the writs of assistance or general warrant, condemned by Lord Camden in *Enting* v. *Carrington,* 19 How. St. Tr. 1029, which subsequently became so potent a cause for the American Revolution. As was pertinently remarked by Judge Anderson in his dissenting opinion in *Park* v. *United States,* 294 Fed. 784, at page 790:

> "Nor should it be overlooked that alcohol is not the only thing that intoxicates. Power is, to the average human being, at least as intoxicating as alcohol. Historically, our Bills of Rights are limitations upon authority vested by governments in officials. These guaranties of personal liberty were attempts by our forefathers to protect citizens against the abuses growing out of the intoxication from official power. They were wise and necessary precautions."

Suspicion and surmise may be sufficient for the seizure of merchandise smuggled into the country but suspicion and surmise certainly cannot be said to be probable cause, for the issuance of a warrant to search persons' houses and effects, within the meaning of the Constitution.

Properly construing the provisions of the Espionage Act above referred to, in the light of the Fourth Amendment to the Constitution, it would seem plain that Congress intended, before a search warrant could be issued against the houses and effects of those charged with a felony or a violation of the National Prohibition Act, it

was incumbent to produce before a judicial officer proof, by affidavit of a person having knowledge of the facts or circumstances, such sworn proof as would be of so convincing a nature as to show that there were reasonable grounds to believe that a crime was committed and that, in cases where property is to be searched, the evidence of crime is concealed upon the premises sought to be searched.

In the recent case of *Schenks* v. *United States*, 2 Fed. (2nd) 185 (Ad. Sh., Jan. 15, 1925, No. 2), Judge Smith of the Court of Appeals of the District of Columbia said:

> "The Fourth Amendment to the Constitution prescribes in terms that cannot be mistaken that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and that no warrants shall issue, *but upon probable cause,* supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The principle of that amendment found favor with the American people a long time before they thought of a Declaration of Independence, a Confederation of States, or a Constitution which would secure their property, their persons, and their homes against unwarranted invasion.
>
> The colonists had no objection to searches and seizures which were ordered upon reasonable grounds for the enforcement of the laws of the land and which the public welfare demanded. They had been taught, however, by the writs of assistance, which met with scant approval even in England, that police officers could not be safely intrusted with unchecked and unrestricted powers to have their will with the person,

the property, or the home of the citizen, and they resented with all their souls the issuance of process which left no one responsible for wrongful or unjustified intrusions on their privacy and their personal and property rights. Indeed, it is not too much to say that of all the causes which led to the Revolution against the mother country, to which the colonies were bound by ties of blood and cherished traditions, nothing more excited the spirit of revolt than unreasonable searches and seizures made under color of law.

When the colonies acquired by force of arms the right to govern themselves, the people did not forget the galling oppressions to which they had been subjected by loosely granted search and seizure writs. They therefore demanded and finally obtained the Fourth Amendment, which was designed to prevent their official servants from becoming their arbitrary and irresponsible masters under the guise of law.

[1-3] The federal courts have most jealously guarded the rights secured to the people under that amendment, and have uniformly held that its purpose cannot be evaded by the issuance of writs on sworn declarations which would permit the person or persons making them to escape responsibility therefor. A sworn statement that a person is informed and believes, or has reason to believe and does believe, that certain facts exist, is not a positive statement that they do exist, or that they are true, and leaves no one responsible for a search or seizure, in case the information of the affiant or deponent should prove to be incorrect, or in case there should be no sound basis for his belief. If the peace officer has reason to believe and does believe that a search or seizure ought to be made,

he should state in his affidavit the facts which led him to that conclusion, and which were known to him of his own knowledge. If he has no first-hand information as to the material facts, but has been informed by another as to facts or conditions which would justify the issuance of process for search or seizure, the officer should secure the informer's affidavit positively alleging of the latter's own knowledge the existence of such facts or conditions. In the event that the informer is unwilling to make such an affidavit, he should be subpoenaed to appear before the judge or commissioner to give testimony as to the truth of the statements made by him to the officer.

Peace officers, to their credit be it said, zealously endeavor as a rule to bring lawbreakers to justice, but unfortunately they are easily satisfied as to the guilt of an accused, although having no legal evidence to convict. To permit them to search for evidence because they deposed that they had reason to believe and did believe that the law had been broken, or because they deposed that they were *informed and believed* that certain facts existed, would leave the home, the property, and the person of the citizen at the mercy of mere suspicion, and of misstatements and misinformation for which no one could be held accountable. It is true that section 3462 of the Revised Statutes (Compt. St. § 6364) does provide that a search warrant may be issued if a revenue officer makes oath in writing 'that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises'; but that does not authorize the issuance of a warrant on an affidavit which would result in defeating the purpose of the Fourth Amendment.

The Constitution is paramount, and the courts will not permit the evasion of the Constitution by validating writs issued on sworn declarations, which literally comply with the terms of the statute, but which fail to establish probable cause, inasmuch as they state the facts on information and belief or state conclusions of fact or of law, instead of positively alleging the material facts. Ripper v. United States, 178 F. 24-26, 101 C. C. A. 152; United States v. Ray (D. C.), 275 F. 1004-1006; Veeder v. United States, 252 F. 414, 418, 420, 164 C. C. A. 338; Boyd v. United States, 116 U. S. 624-630, 6 S. Ct. 524, 29 L. Ed. 746. To hold otherwise would reduce search warrants to the status of the old writs of assistance, and would fritter away the rights guaranteed by the Fourth Amendment, thereby giving free rein to abuses, hateful to a form of government which is intolerant of the arbitrary and irresponsible exercise of power.

We must hold, therefore, that affidavits or depositions which simply state that the affiant or deponent has reason to believe and does believe that a crime has been or is in course of being committed, or which go no farther than to allege conclusions of law or of fact, or which set out on mere information and belief the material facts on which the right to search or seize is based, are insufficient to support a search warrant, and any search warrant issued on such affidavits or depositions is invalid. Ripper v. United States, 178 F. 24-26, 101 C. C. A. 152; Veeder v. United States, 252 F. 414, 418, 420, 164 C. C. A. 338; Salata v. United States (C. C. A.), 286 F. 125, 126; United States v. Pitotto (D. C.), 267 F. 603, 604; United States v. Rykowski (D. C.), 267 F. 866, 869; Giles v. United States (C. C. A.),

284 F. 208, 212-214; Gouled v. United States, 255 U. S. 298, 308, 309, 41 S. Ct. 261, 65 L. Ed. 647.

[4] The federal courts have emphatically held that the admission of property or papers taken from a defendant in violation of his constitutional rights virtually makes him a witness against himself, contrary to the provisions of the Fifth Amendment, and is reversible error. Salata v. United States (C. C. A.), 286 F. 125, 126; Boyd v. United States, 116 U. S. 616, 630, 6 S. Ct. 524, 29 L. Ed. 746; Weeks v. United States, 232 U. S. 383, 396, 398, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 391, 392, 40 S. Ct. 182, 64 L. Ed. 319; Gouled v. United States, 255 U. S. 298, 303, 304, 306, 311, 312, 313, 41 S. Ct. 261, 65 L. Ed. 647. As the search warrant was illegally issued, the articles and things seized thereunder were taken in violation of defendant's constitutional rights, and the admission of them over objection as evidence against her was error."

Tested by this rule, the affidavit of Einstein in the instant case, upon which this search warrant was obtained, falls far short of constituting probable cause. The bare allegations are made that, standing in front of a garage located in the building 611 West 46th Street, used for business purposes only, he saw a truck driven into the entrance and saw the driver unload from the end of the truck a number of cases stencilled "whiskey," which cases had the appearance of being whiskey cases and that he believed they actually did contain whiskey. He concludes his affidavit by the

statement, on information and belief, without disclosing the sources of his information or the grounds for his belief, that the premises "have therein a quantity of intoxicating liquor containing more than ½ of 1% of alcohol by volume and fit for beverage purposes, which is used or has been used and is intended for use in violation of the statute, etc."

He does not say whether the garage in question is a public or a private garage. He does not disclose the name of the person operating the same. He does not state that he saw the truck leave the premises, leaving the cases marked whiskey in the garage. He does not say that he examined the cases and found them to contain intoxicating liquor. He does not state how long he stood at the premises and watched the goods being unloaded. He does not describe the nature of the building in which the garage is contained, other than to say that it was used for business purposes only. Indeed, it was a mere speculation on his part whether the boxes actually did contain whiskey or were mere empty boxes. On his examination before the Commissioner who issued the warrant Einstein swore that he had never been inside of this building; that all the information he acquired was from the outside thereof, standing at a distance of 30 feet from the scene of activity; that he judged that it was a business building, only from the outside of it; that he did not actually know whether the boxes contained whiskey and, indeed, when the search was made, no whiskey was found in the garage itself, at the point where the boxes were unloaded, but a quan-

tity of contraband merchandise was found in other parts of the building. The latter circumstances will be discussed in detail below.

The allegation, made on information and belief, that the premises contained intoxicating liquor, without disclosing the sources of information and the grounds of belief, was surely without evidentiary value whatsoever and is not a statement under oath which can be the subject of a prosecution for perjury.

By the great weight of authority, this statement amounts to a mere nullity. So that, the search in question was clearly conducted *upon mere speculation, surmise and suspicion* and in complete disregard of the constitutional rights of the plaintiff-in-error and appellant. The case of *United States* v. *Casino, supra*, was a similar case and Judge Hand wrote, applying the rule that *prima facie* evidence is required to establish illegal possession, as follows:

> "The affidavit on which the warrant was granted did not allege that on April 17, 1922, the liquor was still in the garage, though the return and this motion both show that this was the fact. The question is, then, whether it was enough, to justify a search two days later that a truck had gone into the petitioner's garage loaded with liquor. Had the agent seen the liquor unloaded from the truck, that would be some evidence of illegal possession by the owner of the garage. Had he waited, and the truck come out empty, that, too, would have been some evidence, or, if the whiskey cases had borne any evidence of ownership by Casino, it would have been quite different. The affi-

davit shows none of these things. On the contrary, it only says that a truck loaded with whiskey drove into the petitioner's garage, which for all that appears may have been doing business as a public garage. That, it seems to me, is not enough to give a right forcibly to search the premises two days later. It is equally consistent with a stop by the truck at the garage for repairs, oil, gas, air or water, or even to pay a visit. It will not, therefore, serve as *prima facie* evidence that the liquors were illegally retained upon the premises when the warrant issued."

POINT II.

The search was unconstitutional in that the affidavit and the warrant in pursuance of which it was made did not particularly describe the place to be searched or the things to be seized.

The affidavit upon which the warrant was issued described the place at which Einstein saw the small truck as a "garage" in the building located at 611 West 46th Street, Borough of Manhattan, City, and Southern District of New York. The nature of this building was not described, and of what heighth, width, construction, occupation or a distinguishing feature is not given, and all that was said by Einstein was that it was used for business purposes only. The warrant directed Einstein to search the four-story building at 611 West 46th Street, Borough of Manhattan, City, and Southern District of New York, said building being used for business purposes only, and any safe, desk, store

room, receptacle, container, basement or sub-cellar, building, room or rooms used in connection with said garage, and directed the search to be made in the aforesaid premises on said premises.

When the warrant was controverted, and on the trial of the criminal information, Einstein admitted that he had never been inside of the building; that he never knew, before obtaining the search warrant, anything about the upper stories thereof. *The affidavit upon which he secured the warrant did not set forth that there was any garage, safe, desk, store room, basement, cellar, sub-cellar, room or rooms connected with or used in connection therewith*, and yet this search was allowed not only for the garage, but in addition for these other places. The place at which he is alleged to have seen boxes marked "Whiskey" was not the place where, after search, any contraband was found. The contraband was found in other parts of the building, which had to be reached by the officer making the search by means of an interior elevator therein. Indeed, *only part of the building was known as 611 West 46th Street,* the other part being known as No. 609. And the liquor which was found after search was found in the latter part, and not in that part which is described in the search warrant. Is this a substantial compliance with the constitutional provisions? If it is, then the constitutional provisions designed to protect the citizens against so-called general warrants have no meaning.

The following authorities support the view that this warrant is void:

United States v. *Friedman*, 267 Fed. 856.
People v. *Mush* (Mich.), 190 N. W. 668.
State v. *Malarkey* (Mont.), 180 Pac. 675.
United States v. *Boasberg*, 283 Fed. 305.
United States v. *Alexander*, 278 Fed. 308.
People v. *Mitchell*, 274 Fed. 128.
United States v. *Innelli*, 286 Fed. 731.
United States v. *Borkowski*, 268 Fed. 408.
United States v. *Rykofski*, 267 Fed. 866.
Lipschitz v. *Davis*, 288 Fed. 974.
United States v. *Vigneau*, 288 Fed. 977.
Atlantic Food Products Corp. v. *McClure*, 288 Fed. 982.
United States v. *Friedberg*, 233 Fed. 313.
United States v. *Slusser*, 270 Fed. 818.
In the Matter of Application for a Search Warrant, 116 Misc. 512, 190 N. Y. Supp. 574.

The latter case is expressly in point. This was a case arising in the State Court. A search warrant was obtained, authorizing the State officials to search premises situated at 52 Front Street, Newburgh, for intoxicating liquors. The agents searched the building located at 57-59-61 Front Street. The search warrant was quashed on the ground that the description of the premises as No. 52 Front Street was no authority for the search of premises 57-59-61 Front Street.

In the case at bar, the warrant, if valid at all, would only authorize the search of the garage at 611 West 46th Street. It certainly could not authorize the search of the garage in premises 609;

but, even if such authority were given, certainly there was no authority to search the upper parts of the building, in the absence of proof in the affidavit upon which the warrant was issued, that they were used in connection with or formed a part of the garage.

In the case of *United States* v. *Slusser, supra,* the Court said, at page 819:

> "(1) First, as to the legality of the search: The search so permitted by Slusser, after declaration by the prohibition officer, with a display of his badge, that they were there to search the premises, was not by such consent as will amount to a waiver of constitutional rights, but on the contrary, is to be attributed to a peaceful submission to officers of the law. There is nothing to the contrary in the cases cited by counsel for the government, viz. United States v. Gouled (D. C.), 253 Fed. 242; Ripper v. State, 178 Fed. 24, 101 C. C. A. 152; McClurg v. Brenton, 123 Iowa 368, 98 N. W. 881, 65 L. R. A. 519, 101 Am. St. Rep. 323; State v. Griswold, 67 Conn. 292, 34 Atl. 1046, 33 L. R. A. 227.
>
> (2) The right of the people to be secure in their houses and effects against unreasonable searches and seizures is not limited to dwelling houses, but extends to a garage used as this was, personally and for hire. If the rule be not so, then not only a garage, but every warehouse, shop, store and office, and even a safe deposit vault, might be ransacked for liquor by officers upon suspicion. Such is not the law. The right to be protected against unlawful search and seizure extends even to a corporation. Silverthorne Lumber Co. v. United States, 251 U. S. 385,

40 Sup. Ct. 182, 64 L. Ed. 319. And a corporation cannot be said to occupy a dwelling house. In Jones v. Fletcher, 41 Me. 254, trespass quare clausum was maintained against an officer, who, with warrant to search the dwelling, searched the barn and seized liquor stored therein. See also, People v. Marxhausen, 204 Mich. 599, 171 N. W. 557, A. L. R. 1505.

(3) *An unlawful search cannot be justified by what is found. A search that is unlawful when it begins is not made lawful when it ends by the discovery and seizure of liquor. It was against such prying, on the chance of discovery, that the constitutional amendment was intended to protect the people.*

(4) Neither is the discretion of the officer, however good and well intentioned, a substitute in law for a search warrant issued by a proper magistrate. It is to the latter that the law has committed the discretion to say when a warrant shall issue; and it can only issue on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person or things to be seized. Constant reiteration of these fundamental principles is warranted by the fact that they seem to be so frequently overlooked."

In *United States* v. *Friedberg*, 233 Fed. 313, the Court said:

"I think the question as to what is an unreasonable manner of search and seizure, where the question is raised, as here, in resisting a seizure of papers by demand for their return, must be determined by the terms of the Fourth Amendment itself, which provides the requisites for a warrant. *A search, to be lawful, and therefore reasonable, must be confined to the place, and the*

seizure to the things, particularly described. If it were not the case that the place to be searched and the things to be seized must be those particularly described, the effect would be that a search warrant providing for the search of a particular place and the seizure of particular things would become a general warrant when placed in the hands of the government officers. The history of the Fourth Amendment by Mr. Justice Bradley in Boyd v. United States, 116 U. S. 616, 3 Sup. Ct. 524, 29 L. Ed. 746, is reviewed in the opinion of Mr. Justice Day in Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834 Ann. Cas. 1915C 1177, and, as there shown, it took its origin in the determination of the framers of the amendments to provide for the Constitution a Bill of rights, securing to the people those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were then permitted under general warrants issued under the authority of the government. By this practice there had been invasions of the home and privacy of the citizens and seizure of their private papers in support of charges, real or imaginary, made against them, and it is stated in the opinion that such practices had also received sanction under warrants and seizures under the so-called writs of assistance, issued in the American colonies. The emphasis which is laid upon the wrongs permitted under general warrants indicates that it was not the intention of the framers of the amendment to permit, under a warrant particularly describing a place and things, a search of other places and a seizure of other things than those particularly described. As was said by Mr. Justice Bradley in the Boyd Case, the essence of the offense against the

Constitutional Amendment 'is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense. * * *'

In so far as the revenue officers searched the premises at 1516 Moyamensing Avenue and seized books and papers there, they were acting without the authority of any warrant describing the premises or the things there seized and in violation of law. The books and papers seized at the premises 234 North Third Street were not and could not be claimed to be within the description of the 'thinks to be seized' upon those premises.

The government seeks to justify the seizure entirely upon the ground that the papers are to be used as evidence upon which the government intends to prove the guilt of the defendant in a criminal prosecution and to forfeit his property in the proceedings in rem contemplated under section 3453. The papers seized are not forfeitable, and hence not subject to seizure. In the seizure, the revenue officers were acting clearly beyond the authority of the warrant, without authority of law, and in violation of the petitioner's constitutional rights. The exigency of necessity for obtaining evidence in a particular case does not justify the tendency which has grown up to proceed by 'raid' of the house and property of a supposed offender, rather than by the orderly process provided by law and guaranteed by the Constitution.

The rule will be made absolute."

The testimony at the time the warrant was controverted before the Commissioner discloses, without dispute, that part of the premises, the second floor, was used by the Liquid Carbonia Company,

which installed shelving and fixtures; half of the third floor was used by medical people by the name of Betts & Company (No. 235, pp. 42-43).

The facts in this case are similar to that of the case of the *United States* v. *Inelli* (*supra*), where the Court said (at pp. 732-733):

> "A further one is directed to the description of the place. It is described by street and number, and the name of the person to whom the premises then or formerly belonged. Had the whole premises included within the description belonged, as was doubtless erroneously taken for granted, to the person whose place was meant to be searched, such a description as that given might meet all practical needs. *The fact, however, is that the second floor of the premises belonged to a transportation company.* It must not be forgotten that a warrant is a command which must be obeyed. It is true that the persons to whom it is directed are expected to use judgment and discretion in its execution, but the command is none the less imperative. Such a command should not direct a search which would be wholly unjustified. If the place described by street and number is used by a number of persons for different purposes, then it is not a place; but there are several places included in the one description. It is then a general, but not a 'particular' description. The evidence upon which the warrant issues should go to all the essential features of the authority given, and the particular place to be searched is one, and an important one.
>
> The evidence in the instant case admittedly did not justify a search of the place described in the warrant. The description

> was too broad, and included premises to search which no probable cause appeared. This does not mean that the facts are to be found after the search, and the warrant upheld or not according as the facts are made to appear. The finding under review is one not of guilt, but of probable cause. Probable cause may exist, and a search warrant properly issue, although the real facts may be found not to justify it. This is true of any case of arrest. The existence of probable cause for arrest is not inconsistent with a finding of not guilty. The evidence before the commissioner in respect to the place was too general and too meager to permit the place to be searched to be 'particularly described,' and for this reason the search warrant proceeding cannot be sustained."

Certainly, even assuming for the sake of argument, that the entire building was under the control of the plaintiff-in-error and appellant, the affidavit upon which the search warrant was issued certainly did not justify the issuance of a warrant embracing the entire building. Had the affidavit set forth that the entire building was used as a garage by one person, by the same interests, then the building, if it can be said that there was probable cause for believing that the building contained contraband liquor, might have been subjected to search, but where the affidavit confined the place where the contraband was found to the garage in the building, the issuance of a warrant directed to other parts of the building was a flagrant violation of Steele's constitutional rights.

Concededly the entire building was not used as a garage, and concededly the contraband which was found was not found in the part of the building

where it was stated to be by the prohibition agent. We submit that the record discloses that there was no basis for the issuance of a warrant for the entire building; there was no basis, as the language of the warrant says, for the search of a safe, desk, store room, etc., used in connection with the garage, and that this search was entirely unconstitutional.

We now come to the discussion of the question of whether or not the property to be seized was adequately described.

Einstein states in his affidavit that he saw a number of cases stencilled "whiskey" being unloaded from a truck in the garage. How many cases he does not state; whether one, two or three, or more than that number. The warrant issued upon this affidavit was not to search for these cases stencilled "whiskey" but directed Einstein to search for certain intoxicating liquor containing more than one-half of one per cent. of alcohol by volume, fit for beverage purposes. Was this a particular description of the things to be seized? Obviously it was not (*State* v. *Peterson,* 27 Wyo. 185, 194 Pac. 342, at p. 350; *Keefe* v. *Clark,* 287 Fed. 372).

There have been cases taking a different view of the law in this matter:

Elrod v. *Moss,* 278 Fed. 123 (at p. 129).
Petition of Barbour, 281 Fed. 550.
Watson v. *State* (Neb.), 189 N. W. 620.

The reasoning of these cases is specious. In the *Elrod* case the Court said that because liquor is contraband "there can be no danger of a citizen being deprived of property which he is lawfully entitled to hold against the State." This entirely

overlooks the fact that all intoxicating liquor containing more than one-half of one per cent. of alcohol is not contraband. Liquor such as is held for permitted uses, such as for medicinal and sacramental purposes, is certainly not prohibited by law, nor is liquor held in a private dwelling acquired before the National Prohibition Act became effective, contraband.

Matter of Barbour holds that a general description of liquor, such as is here involved, is permitted, unless it can be shown that the person was misled or prejudiced by such description. Such a rule would throw the entire burden of proof on the person against whom the search is directed, rather than on the Government under the constitutional requirements and under the legislative intent as evidenced by the Espionage Act.

It may be argued that a more definite description could not possibly be devised by Government agents. A difficulty in acquisition of evidence sufficient on which to base a search warrant, certainly cannot be reason for relaxing the constitutional guarantees. It would not tax the imagination greatly to conceive of cases where an adequate description for contraband can be devised. Looseness in such a matter would tend to break down the constitutional guarantees by judicial interpretation, and should not be tolerated for any reasons of expediency.

POINT III.

The warrant of search and seizure was executed by an unauthorized officer and is void.

The 6th and 7th assignments of error (No. 636, p. 29) are as follows:

> "6. On the further ground that the search warrant was not issued to a civil officer of the United States and that the person authorized to make such search and seizure, to wit: Isidor Einstein, was not a civil officer of the United States, authorized to make search and seizure under the statute in such case made and provided.
>
> 7. On the further ground that the said affidavit, or the oath or affirmation upon which said search warrant was based, contained no proof that Isidor Einstein was authorized by the Commissioner of Internal Revenue or any other officer of the United States to execute such warrant for search and seizure."

Section 6 of the Act of June 15, 1917, Chapter 30, Title XI, quoted on pages 17-18 of our brief, provides that the warrant should issue to "a civil officer of the United States, authorized to enforce or assist in enforcing any law thereof, or a person so duly authorized by the President of the United States."

Einstein, in his affidavit, produced no proof that he was authorized by the President of the United States to enforce or assist in enforcing any law thereof, nor did he state that he was a civil officer of the United States. In his affidavit he describes

himself as a "general prohibition agent" assigned to duty in the State of New York.

Upon the criminal trial upon the information charging the plaintiff-in-error with unlawfully possessing intoxicating liquor, he testified that he was employed by the Treasury Department of the United States and was so employed since the National Prohibition Act went into effect in 1920 (No. 235, p. 10, fol. 12). As a general prohibition agent he was not a civil officer of the United States, and hence the warrant is void.

United States v. *Musgrave*, 293 Fed. 203.

The above decision was challenged by the following cases:

United States v. *O'Connor*, 294 Fed. 584.
United States v. *American Brewing Co.*, 296 Fed. 772.
United States v. *Edwards*, 296 Fed. 512.
United States v. *Montalbano*, 298 Fed. 667.
Smith v. *Gillian*, 282 Fed. 628.
United States v. *Syrek*, 290 Fed. 823.
United States v. *Loeffelman*, 297 Fed. 472.

We do not believe the reasoning of these cases is sound, in view of the plain provision of the Espionage Act, making it clear that the intention of Congress was that a search warrant may be sworn out by any person but can only be executed by one in whom trust or confidence may be imposed, having the dignity of either a civil officer of the United States or duly appointed for that purpose by the President of the United States.

In the case of *United States* v. *O'Connor, supra*, the learned District Judge argues that because Sec-

tion 2, Title II of the National Prohibition Act, the Commissioner of Internal Revenue and his agents are directed to investigate and report violations and swear out warrants, and by Section 5 he and his agents and inspectors are vested with power for the enforcement of existing laws relating to the manufacture and sale of intoxicating liquor, under the laws of the United States, and because by Title II, subdivision 1, the Commissioner may delegate or designate an agent to perform such acts as he is by law authorized to perform and because by Title II, Section 26 of that law, the Commissioner is authorized to make seizures of vehicles discovered in the act of unlawfully transporting liquor, and because by Section 28 of Title II he is vested with all the power and protection in the enforcement of the Act, which is conferred by law for the enforcement of existing laws relating to intoxicating liquors, and by Section 3462 of the Revised Statutes, search warrants may be issued to *internal revenue officers* for execution, it follows that the power to permit the *execution of search warrants* by prohibition agents *is thus impliedly conferred.* It is further argued that under Section 6 of the Act supplemental to the National Prohibition Act, 42 Stat. 223, an officer, agent or employee of the United States who makes a search *without a warrant* may be held liable for a misdemeanor and fined; that this latter section also confirms, by implication, the power of a prohibition agent to execute a search warrant.

We cannot believe that Congress so intended. If it had, it would have been an easy matter to have conferred such *power expressly rather than by implication.*

Section 3462 of the Revised Statutes authorizes the issuance of a search warrant to an internal revenue officer upon his oath, if he has reason to believe and does believe that a fraud upon the revenue has been or is being committed. This section cannot apply to cases other than smuggling as otherwise it would conflict with the Fourth Amendment as we have shown under our first point.

If Congress had intended that this provision of the Internal Revenue Laws should have application to the enforcement of the National Prohibition Act, it would not have made the provisions of the Act of June 15, 1917, expressly applicable to violations thereunder, but would have expressly made Section 3462 of the Revised Statutes applicable. The Act of June 15, 1917, is all inclusive and sets forth minutely the procedure to be followed in the issuance of a search warrant.

Nor is the power to execute search warrants extended to prohibition agents because the Act supplemental to the National Prohibition Act prohibits agents of the Commissioner of Internal Revenue from searching without a warrant. True, the implication is that they are permitted to search if a warrant is issued, but it does not follow that they are thereby authorized by implication to execute them.

There is a distinction to be observed between a person *authorized to execute a warrant* and a person *authorized to perform the actual labor of the search*. Thus, by Section 7 of the Act of June 15, 1917, it is provided that "a search warrant may in all cases be served by any other officer mentioned in its direction, but by no other person, except in aid of the officer on his requiring it, he being pres-

ent and acting in its execution." In other words, a prohibition agent or an agent of the Department of the Commissioner of Internal Revenue may aid in the search and engage in the actual physical labor of a search of the premises, provided the same is done under the supervision of a civil officer of the United States and at his request, is what the Congress clearly intended should be the procedure to be followed, as otherwise any irresponsible person, without standing or character, who may temporarily be employed by the Commissioner of Internal Revenue may secure search warrants, violating the personal liberty of citizens and conduct unreasonable and unconstitutional searches and seizures. It was clearly the intention of Congress to leave this dangerous remedy in the hands of cool and impartial officers of the Government, rather than persons, who either by misguided zeal or actual corruption may abuse their powers and privileges and thus bring the administration of justice and the Constitution into public contempt.

POINT IV.

The Trial Judge erred in refusing to charge the jury as requested.

The 12th assignment of error is as follows (No. 636, p. 30; see pp. 22, 23):

> "12. On the ground that the Court erred in refusing to charge the jury as requested by the defendant as follows: 'That it may find that the search made by Isidor Einstein

and his associate, Mr. Smith, was unreasonable, they have a right to disregard the entire testimony.' Also, 'That if they find from the evidence that Einstein had no reasonable or probable cause to believe that the premises on 46th Street contained intoxicating liquor in violation of the National Prohibition Act, and if they believe that the affidavit upon which the search warrant was actually issued was based upon mere surmise or suspicion or conjecture, they have a right to disregard his entire testimony and that of the Agent Smith.' Further, That 'If they believe the warrant in this case did not particularly describe the place to be searched and the persons or things to be seized, they have a right to disregard the entire testimony of Agents Smith and Einstein, who made the search.' And lastly, 'That if they believe that any of the provisions of Articles 4 and 5 of the Constitution of the United States have been violated by this search and seizure, they have a right to disregard the entire testimony of the agents for the Government and acquit the defendant.' "

Probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable or not probable existed, is a matter of fact; but whether, supposing them true, they amount to probable cause, is a question of law.

Assuming for the sake of argument, but of course without conceding, that *prima facie* the evidence in the form of the affidavit before the Commissioner in issuing the search warrant was sufficient to show probable cause and contained a sufficient description of the property to be searched and the things to be seized, nevertheless whether this affidavit was true and whether Einstein who

testified at the trial told the truth, was certainly a question of fact for the jury. They were not bound by his testimony, even though it was not contradicted, bearing in mind the surrounding circumstances, his interest in the case as one of the prosecutors.

But assuming without conceding that the jury could not disregard the testimony of Einstein and bound to accept the same, certainly the circumstances were such, to say the least, that *it cannot be said as matter of law* that there was probable cause and a proper description to authorize this warrant of search and seizure. The deductions from the testimony of Government's witnesses are such, providing the Court is willing to resolve the questions of law in favor of the Government, that reasonable minds may well differ as to whether what Einstein said would afford reasonable grounds for the issuance of a search warrant. That question should have been submitted to the jury to be passed on by it as a question of fact.

The refusal to charge as requested, was, therefore, clearly error (*Miller* v. *Brown*, 3 Mo. 127, 23 Am. Dec. 693).

CONCLUSION.

Having shown that the search warrant was void; having shown that the search was unreasonable and a violation of the constitutional rights of the plaintiff-in-error and appellant, and that the evidence upon which the plaintiff-in-error was convicted was based upon such search and seizure, in violation of the Fifth Amendment, the Trial Judge erred in refusing to suppress such evidence, and the District Court erred in making the decree from which the appeal is taken.

It is needless to point out that the mere fact that the evidence secured upon the search proved that the plaintiff-in-error was violating the National Prohibition Act is no answer. The search cannot be legalized by the evidence discovered by violating the constitutional rights of the accused (*Gouled* v. *United States,* 255 U. S. 298).

POINT V.

The judgment and decree appealed from should be reversed with directions to the District Court to vacate the search warrant and restore the property seized to the claimant, and the judgment of conviction should be reversed and a new trial directed.

Respectfully submitted,

MEYER KRAUSHAAR,
Counsel for the Plaintiff-in-Error
and Appellant.

APPENDIX.

"There is some dramatic history in connection with the constitutional provisions about search and seizure which has a distinctly humorous as well as a serious aspect. The tenth article of the Virginia Bill of Rights of 1776, the fourteenth article of the Massachusetts Bill of Rights, and the fourth amendment to the Federal Constitution were popular expressions of protest against the enforcement of laws which were commonly regarded as arbitrary and unreasonable, in other words, they grew out of the common opinion in colonial America that 'smuggling' in violation of the unreasonable and obnoxious British trade restrictions were not only an adventurous and patriotic sport and a lucrative occupation, but almost an inalienable right. This view was strong in New England, and, of course, the attention of the colonists was focussed on the whole matter by the dramatic argument of James Otis against the Writs of Assistance in the Old State House in Boston in 1761.

"The story leading up to the application for the writs is told by Professor Channing as follows:

> "'Acts of Parliament restraining colonial navigation and taxing the colonies of the continent for the benefit of the West Indian sugar planters had been on the statute book for years. The Northerners had observed whatever of them they liked and had attended little to the rest, except now and then to bribe an inquisitive governor or an overcurious customs collector. In 1760 Wil-

liam Pitt, finding that the continental colonists were trading with the French and Spanish Islands in the West Indies, cast about for the best means to put a stop to this traffic with the enemy. His advisers told him that if the Sugar Act of 1733 were enforced, this trade must come to an end. This was true because this law provided a prohibitive duty of sixpence per gallon on all molasses brought into the northern colonies, except that which came from British plantations. To enforce the act would deprive the French and Spanish planters of the means of paying for lumber, fish, and flour which they needed for their slaves and for themselves. Thereupon, Pitt ordered the provisions of the act to be enforced to the letter.

" 'The Sugar Act had never been executed for two reasons. In the first place, as soon as it was passed the British sugar planters discovered that what they really wanted was the right to export sugar directly from the islands to continental Europe. Obtaining this favor, they no longer needed the northern American market. In the second place, in the existing conditions of trade, an adequate supply of molasses for distillation into rum was absolutely necessary for the prosperity of New England and the Middle Colonies. Rum was the currency used in the African trade and in the fur trade, and enormous quantities of it were consumed at home and in other English colonies. Not one-quarter enough molasses was produced in the English islands to satisfy the needs of the northern distillers—they must have foreign molasses or go out of business. In the absence of any efficient customs service it was not difficult to evade this law or any other. A false clearance might be obtained at Anguilla, or some other British island, or

collectors, governors, and judges might be bribed by the payment of a small percentage of duty that should have been levied under the act. Even when the officials wished to collect the duty, they found it very difficult to do so where the whole population was against them. Ordinary search warrants were of little use because these were issued only upon information and applied only to certain specified goods in specified places. A writ of assistance was more efficacious because it enabled the holder to search any house or ship, to break down doors, open trunks and boxes, and seize goods at will. In case of opposition, he might call upon the civil authorities for aid. These general writs had been used in England a long time, and a few of them had been issued in the colonies. The announcement that the Sugar Act was to be enforced caused more alarm at Boston than the taking of Fort William had, three years earlier. There was a doubt as to the legality of the existing writs, and the death of the old king put an end to whatever virtue there was in them. The collectors applied for new writs, and the merchants determined to oppose their being granted.'—Channing, 'History of the United States,' Vol. III, pp. 2-3.

"The Virginia Constitution was the first of the state constitutions with a bill of rights. It appeared in 1776 and the tenth section was as follows:

> "'Sec. 10. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons, not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.'

"This provision obviously merely makes the issuance of general warrants illegal. It is narrower in its terms than the fourteenth article of the Massachusetts constitution which reads as follows:

> "'XIV. Every subject has a right to be secured from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to his right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.'

"In the Virginia Convention of 1788, in which Patrick Henry led the opposition to the ratification of the Federal Constitution, he objected to it because there was no bill of rights and said that without one, 'Excise men may come in multitudes * * * go into your cellars and rooms, and search, and ransack, and measure, everything you eat, drink and wear' (Beveridge 'Marshall,' Vol. I, 440).

"The Fourth Federal Amendment is substantially like that in Massachusetts, though shorter; it reads:

> "'ART. IV. The right to the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no war-

rants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.'

"Now when we consider that these amendments grew out of the movement to *protect* the business of 'smuggling' the ingredients of New England rum, it is not surprising that history should repeat itself to-day under the eighteenth amendment. The Volstead Act to-day is regarded by great numbers of Americans in much the same light as the British trade restrictions and the Stamp Act in the eighteenth century, and 'rum running' to-day is regarded as a reasonably legitimate performance just as the 'molasses running,' with rum as its ultimate objective, was regarded then. It is not a question whether it ought to be so—it may be unfortunate—but it certainly is so and it is a perfectly natural and inevitable incident of such legislation as the Volstead Act. The constitutional protest of the American people against being governed *too much* whether by a king or by legislatures or temporary majorities, contained in the fourth amendment since 1791, raises quite as serious a problem of constitutional interpretation for the courts as does the eighteenth amendment."

F. W. G.

INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1924

JOHN F. STEELE, APPELLANT
v.
THE UNITED STATES
No. 235

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN F. STEELE, PLAINTIFF IN ERROR
v.
THE UNITED STATES
No. 636

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

STATEMENT

Cause No. 235

On December 6, 1922, a search warrant was issued by a United States Commissioner for the Southern District of New York to Isidor Einstein, a General Prohibition Agent, upon an affidavit made by said

agent, authorizing and directing the search of a certain garage located in the four-story building at 611 West 46th Street, New York City, and any rooms, etc., used in connection therewith, for intoxicating liquor, used or intended for use in violation of Title II of the National Prohibition Act, and the seizure of the same. (R. 6–8, No. 235.)

In the affidavit upon which the warrant was issued the agent asserted that on the same day, while standing in front of the garage located in the above building, accompanied by another agent, he saw a small truck driven into the entrance and saw the driver unload from the end thereof a number of cases stenciled " Whiskey," the cases being of the size and having the appearance of whiskey cases.

In compliance with the warrant, Agent Einstein searched the premises and found the following articles which he seized and took into his possession:

150 cases whiskey,
92 bags whiskey,
1 five-gallon can alcohol,
6 five-gallon jugs of whiskey,
33 cases gin,
102 quarts whiskey,
2 fifty-gallon barrels of whiskey,
1 corking machine.

Plaintiff in error Steele, the owner of the premises, controverted the warrant and petitioned to vacate the same, on the ground that it was issued without reasonable and probable cause and in vio-

lation of his constitutional rights. A hearing was had before the United States Commissioner, in pursuance of the act of June 15, 1917, chap. 30, Title XI, 40 Stat. 228, et seq., commonly known as the Espionage Act, and in pursuance of which the warrant was issued, and the petition was denied. (R. 46, No. 235.)

Thereupon, plaintiff in error applied to the District Court for the Southern District of New York, upon the proceedings had and depositions taken before the Commissioner, to vacate and set aside the search warrant and to direct the restoration of the property seized thereunder. On November 9, 1923, the court denied the application, on the ground that the property taken was the same as that described in the warrant and that there was probable cause for believing the existence of the grounds on which the warrant was issued. It was further ordered that the property remain in the custody of the officer by whom it was seized or be otherwise disposed of according to law. (R. 3, No. 235.)

Plaintiff in error then filed assignments of error alleging that the search warrant was issued in violation of the Fourth Amendment to the Constitution, in that it was not issued upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized; that the search was unreasonable; that the warrant violated the Fifth Amendment, in that it deprived plaintiff in error of his

property without due process of law and compelled him to be a witness against himself in a criminal case, and that the warrant limited the search to No. 611 West 46th Street, New York City, whereas the officer in executing the warrant searched other and different premises, namely, 609 West 46th Street. (R. 2, No. 235.)

A direct appeal was allowed from said order and decree of the District Court, and the case is now before this court as No. 235.

Cause No. 636

Thereafter, an information was filed against plaintiff in error in the District Court for the Southern District of New York, charging him with possession in violation of Title II of the National Prohibition Act of the intoxicating liquor described in the return made by the prohibition agent. (R. 1, No. 636.) A trial upon the information was had on the 12th day of March, 1924, before District Judge Garvin and a jury, and defendant was convicted on the evidence obtained by Prohibition Agents Einstein and Schmidt during the execution of the search warrant.

At the trial various motions were made by the defendant to strike out said evidence and to quash the search warrant, on the ground that it was illegal and improperly secured for the same reasons above described, and upon the additional ground that the warrant was void because it was not issued to a civil officer of the United States as required by the provisions of the Espionage Act.

From a judgment of conviction and a sentence of $500 fine (R. 24, No. 636) defendant sued out a writ of error from this court, and the case is docketed as No. 636.

Upon motion of appellant and plaintiff in error both causes were consolidated and advanced for argument.

STATUTES INVOLVED

The statutes involved in these cases will be found in an appendix to this brief.

QUESTIONS PRESENTED

The questions presented all relate to the validity of the warrant under which the search and seizure were made and to the power and authority of a Federal prohibition agent to execute the same. The warrant is attacked on the following grounds:

1. That it was not based upon probable cause, and

2. Did not particularly describe the place to be searched or the things to be seized.

ARGUMENT

I

Validity of the search warrant

A. The showing of probable cause was sufficient

Plaintiff in error contends, first, that the search and seizure were unconstitutional because the warrant and the affidavit upon which it was issued were

not based upon probable cause, but upon suspicion, surmise, and hearsay.

It is conceded that mere rumor, surmise, conjecture, or suspicion can not form the basis for believing the existence of probable cause, and that the affidavit upon which a search warrant is obtained can not consist of mere conclusions based upon hearsay or upon information and belief. This principle is well established by the cases relied on, but the Government claims that they are not applicable here, for the reason that in the instant case the affidavit set forth evidentiary facts upon which the agent's conclusions were based and, taken together, were of such a nature as to warrant the Commissioner's finding that there was reasonable ground for believing that a crime was being committed on the premises sought to be searched.

The search in question was made under the authority of the Espionage Act, *supra*, as the same has been made applicable to cases involving a violation of the National Prohibition Act, section 2, Title II. Section 5, Title XI, of the Espionage Act, provides:

> The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

This provision, the Government insists, has been fully complied with in the instant case. The affidavit of Prohibition Agent Einstein, upon which

the search warrant was based (R. 24, No. 636), contained the following:

> On December 6, 1922, at about 10 o'clock a. m., accompanied by Agent Moe W. Smith, I was standing in front of the garage located in the building at 611 West 46th Street, Borough of Manhattan, City and Southern District of New York. This building is used for business purposes only. I saw a small truck driven into the entrance of the garage and I saw the driver unload from the end of the truck a number of cases stencilled whiskey. They were the size and appearance of whiskey cases and I believe that they contained whiskey.
>
> A search of the records of the Prohibition Director's office fails to disclose any permit for the manufacture, sale, or possession of intoxicating liquors at the premises above referred to.

This is a statement of facts based upon the agent's personal knowledge of what he saw, and is not based upon surmise or hearsay. He says he saw a truck driven into a garage of what appeared to be a building used for business purposes; that he saw the driver unload from the truck a number of cases stencilled "Whiskey," and that they had the size and appearance of whiskey cases. He then says that a search of the records of the Prohibition Director's office fails to disclose any permit for the manufacture, sale, or possession of intoxicating liquors at the above premises. It is upon this

statement of facts of what he actually saw and knew that he bases the following belief (R. 25, No. 636):

> The said premises are within the Southern District of New York and upon information and belief, have thereon a quantity of intoxicating liquor containing more than one-half of one per cent of alcohol by volume, and fit for use for beverage purposes, which is used, has been used and is intended for use in violation of the statute of the United States, to wit, the National Prohibition Act.

It is submitted that the facts recited constituted reasonable grounds for the agent's belief of the presence of liquor upon the premises and were sufficient to support the Commissioner's finding of probable cause upon which the warrant was issued. True, the agent could not be positive that the cases contained whiskey. But positive knowledge is not required by the Espionage Act, but only "facts *tending to establish* the grounds of the application or probable cause for believing that they exist." Evidence to show probable cause which will authorize issuance of a liquor search warrant need not all be common-law evidence which would be admissible in court. *In re Kupferberg,* 284 Fed. 914. Probable cause has been defined by this court as "A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged."

Stacey v. *Emery,* 97 U. S. 642, 645. In 24 R. C. L., p. 706, it is said:

> The question of probable cause does not depend on whether the offense had been committed in fact, or whether the accused is guilty or innocent, but on the affiant's belief based on reasonable grounds. He may act on appearances, and if the apparent facts are such that a discreet and prudent man would be led to believe that the accused had committed a crime, he will not be liable for malicious prosecution although it may turn out that the accused was innocent.

Moreover, if positive knowledge were required, as is insisted upon by plaintiff in error, in instances of this nature, it would be impossible to enforce the Eighteenth Amendment. Agents rarely have an opportunity to examine packages and it is seldom possible for them to be certain of their contents. The packages here in question were *stencilled* "Whiskey." They were not merely labeled, but were marked in the manner that cases in which whiskey is packed usually are marked. They were "regular whiskey cases." (R. 14, No. 636.) As they were unloaded, it was reasonable to suppose that they were to be illegally retained in the garage. In *United States* v. *Casino,* 286 Fed. 976, relied on by plaintiff in error, the court, in quashing a search warrant because the truck was not unloaded and the search warrant was issued two days later, said: "Had the agent seen the liquor

unloaded from the truck, that would be some evidence of illegal possession by the owner of the garage." The foregoing evidence, coupled with the manner in which the cases were handled and the knowledge that no permit existed for the premises in question, was sufficient to warrant the belief that the law was being violated.

This case is not within the rule that affidavits or depositions are insufficient to support a search warrant where they simply state that the affiant or deponent has reason to believe, and does believe, that a crime has been or is in course of being committed, or which go no further than to allege conclusions of law or of fact, or which set out on mere information and belief the material facts on which the right to search or seize is based.

It is submitted that the facts set forth in the affidavit here in question are sufficient to establish probable cause for believing that the garage in the premises sought to be searched was used for the purpose of illegally possessing intoxicating liquor.

B. The place to be searched was sufficiently described

It is next insisted that the search was unconstitutional in that the affidavit and the warrant in pursuance of which it was made did not particularly describe the place to be searched or the things to be seized.

The affidavit upon which the warrant was issued described the place at which Einstein saw the truck as a

> garage located in the building at 611 West 46th Street, Borough of Manhattan, City and Southern District of New York. This building is used for business purposes only.
>
> * * * * *
>
> This affidavit is made to procure a search warrant, to search said building at the above address, any building or rooms connected or used in connection with said garage, the basement or subcellar beneath the same, and to seize all intoxicating liquors found therein.

The warrant directed the search of

> a certain garage located in the four-story building at 611 West 46th Street, Borough of Manhattan, City and Southern District of New York, said building being used for business purposes only—and in any safe or desk, storeroom, container, receptacle, basement or subcellar, building, room or rooms connected or used in connection with said garage. (R. 24–25, No. 636.)

Complaint is made that Einstein admitted that he had never been inside the building; that he never knew, before obtaining the search warrant, anything about the upper stories thereof; that the affidavit upon which he secured the warrant did not set forth that there was any garage, safe, desk, storeroom, basement, cellar, subcellar, room or rooms connected with or used in connection therewith; that the place at which he is alleged to have seen the boxes marked whiskey was not the place where, after search, the contraband was found;

that the contraband was found in other parts of the building which had to be reached by the officer making the search by means of an interior elevator; that only part of the building was known as 611 West 46th Street, the other part being known as No. 609; and that the liquor which was found after search was found in the latter part, and not in that part which is described in the search warrant.

In an affidavit presented to the Commissioner when the search warrant was controverted, plaintiff in error alleged that he lived on the third floor of the premises; that while the warrant stated that the goods to be seized were located in a garage in No. 611 West 46th Street, practically all the goods seized were taken from No. 609 West 46th Street; that 609 is a separate and distinct building from 611; that there is a common party wall between the two buildings; and that a photograph to be produced would show the separate and distinct character of both buildings on the outside as well as the inside. It was further alleged that 150 cases and 92 bags of whiskey and one 5-gallon can of alcohol were seized on the third floor of premises 609, " in the premises adjoining the living quarters of your deponent, which living quarters your deponent shares with another man by the name of Oscar Smith, his wife and child "; that photographs would distinctly show his living quarters and the curtains on the outside windows where he is living, " which

said quarters consist of three rooms, in one of which rooms the said three items of 150 cases of whiskey, 92 bags of whiskey, and one 5-gallon can of alcohol were located "; that the goods seized on the second and third floors of premises No. 609 belonged to him and he had a legal right to their return because " they were in the premises wherein he has his dwelling "; that the goods seized in the adjoining building, No. 611, did not belong to him and he made no claim for them; and further that it is impossible to gain access to the upper floors of premises 609 by going into building No. 611. (R. 8, No. 235.)

This affidavit was controverted at almost every material point by the testimony of the prohibition agents presented to the Commissioner and to the court on the trial of the criminal information, which testimony was evidently believed by the Commissioner, the court and jury. The agents testified that the building was a large brick structure which had the appearance of a garage. The numbers on the building were 609 and 611. (R. 13, 15, 22, 25, No. 235.) The agents entered the building at No. 611, where they had seen the liquor being unloaded. They found no liquor on the ground floor. They then proceeded to the second floor by an elevator located in the rear center of the garage. (R. 16, 32, 33, No. 235.) As they were leaving the elevator on the second floor they saw three men bottling and bagging whiskey in a small

room partitioned off on the 611 side of the building. In another inclosed place, on what has since been learned was the 609 side of the building, they found 36 cases of gin, which they seized together with a corking machine. They then went to the third floor by the same elevator, where they seized 92 bags and 150 cases of whiskey in an inclosed room on the 609 side adjoining a room later claimed by plaintiff in error to be his living quarters. No tax paid labels were found on these bags and cases. (R. 17–18, 33, 34, No. 235.) The entrances to the building consisted of two small and two large doors, the latter being used by automobiles. On the right hand, or 609, side of the building were stairs leading to the upper floors, but they were barred. There was also a stairway on the left hand, or 611, side of the building. Between these two stairways are the entrances to the garage. There is no partition separating the building on the street floor. There are no partitions on the upper floors except the beams supporting the building and a few small rooms inclosed with rough boards nor anything to indicate that there were two separate buildings. To the agents the upper floors had the appearance of store rooms. (R. 18, 27–28, 31–32, 33, 36, No. 235.)

After this testimony was in plaintiff in error took the stand and admitted that only parts of the upper floors are partitioned off; that the elevator is used to reach both sides of the upper floors; that the elevator is strong enough to carry automobiles;

that only parts of the upper floors are rented for storage purposes; that the liquor seized on the third floor was not taken from his living quarters, but from an adjoining room, and that the gin on the third floor was stored there by him. (R. 40–45, No. 235.)

It will thus be seen that there is no basis for the contention that the search warrant was broader than the affidavit or that the search went beyond the authority of the warrant. The warrant directed the search, as requested in the affidavit, of any rooms used in connection with the garage. This was proper, as it was not to be presumed that the liquor would be stored in the garage in plain view of every one. The search of the upper floors was not unlawful, because the testimony clearly shows that they were connected with or used in connection with the garage. They were connected by elevator and stairs. The elevator was large enough to carry automobiles, and it was no doubt used to carry the liquor and other articles from the garage to the floors above. The description of the building by street and number and as a four-story building was sufficient. The cases relied on by plaintiff in error are not in point. They relate to searches of separate and distinct buildings, several doors removed from the buildings described in the warrants. In the instant case, the agents saw only the garage on the street floor. It was entirely open and covered the whole ground floor of the building. So far

as they were concerned, that situation controlled throughout the entire building; and the record does not support plaintiff in error's contention that there were two separate buildings. The evidence shows that the upper floors also were open, with the exception of a few small inclosures. So with respect to the claim that the building was used for other than business purposes. The agents saw no curtains at the windows or any other indications of a dwelling, if indeed the living quarters may be called such—they consisted of two rooms, plaintiff in error sleeping on a cot in the kitchen. The building was an old structure, looked like a garage and the agents did not think that any one lived there. (R. 22, 24, 36, 45, No. 235.) As above pointed out, the liquor on this floor was not seized in the living quarters, but in an adjoining room.

C. The property to be seized was adequately described

It is urged that the direction in the warrant to search for " certain intoxicating liquor containing more than one-half of one per cent of alcohol by volume and fit for use for beverage purposes " was not a sufficient compliance with the Constitution and the statute requiring a particular description of the things to be seized.

This contention is equally untenable. Every constitutional or statutory provision must be construed with the purpose of giving effect, if possible, to every other constitutional or statutory provision and with a view to new conditions and circum-

stances in the progress of the Nation. *Downes* v. *Bidwell,* 182 U. S. 244; *South Carolina* v. *United States,* 199 U. S. 437. So the provisions of the Constitution forbidding unreasonable searches must be construed in the light of the constitutional provision against the sale, manufacture, and transportation of intoxicating liquors. No one can have any right of property in contraband liquor or any right to possess it. As soon as it comes into existence it is forfeited. Intoxicating liquors are inclosed in so many different forms of packages that if the same particularity of descriptive identification were required as in the case of stolen goods traffickers in such liquors would have practical immunity. The distinction between private papers, etc., and goods forfeited to the Government is clearly pointed out in *Boyd* v. *United States,* 116 U. S. 616. In warrants for search and seizure of stolen goods particularity of description is necessary to the protection of the individual from the seizure of other goods of the same general character and his lawful property. But protection of the rights of the accused does not require that the Constitution be construed to exact the same degree of particularity of description in search warrants for contraband liquor, because there is no right of property in such liquor and hence there can be no danger to the citizen of being deprived of property which he is lawfully entitled to hold as against the Government. See *Elrod* v. *Moss,* 278 Fed. 123.

In *Giles* v. *United States,* 284 Fed. 208, in considering section 25 of the National Prohibition Act, which prohibits the possession of liquor intended for use in violation of the act and declares that no property rights shall exist therein, the court said, p. 210:

> The main purpose of this provision is to put intoxicating liquor, illegally possessed, and property designed for unlawful manufacture thereof, into the same category as gambling implements, counterfeit money, obscene literature, and other forms of outlawed articles. Search warrants are an appropriate and long used means of governmental seizure for destruction of such outlawed articles.

It is not alleged that plaintiff in error was misled or prejudiced by the description. In *Petition of Barber,* 281 Fed. 550, 554, it is said:

> The affidavit alleged that in the " malt and hops store " located at the address mentioned therein there was a " large stock of malt and hops and other utensils for the making of beer displayed for sale." This description, especially in view of the character of the materials and utensils mentioned and the use to which, according to common knowledge, they are adapted, and under all of the circumstances, was, in my opinion, sufficiently definite and particular to authorize the search and seizure of such hops, malt, and utensils. It is not claimed by petitioner that any person was misled or prejudiced by such

> description, and I can not doubt that the objection based upon the alleged indefiniteness of description of such property or supposed variance between the property so described and the property seized must be overruled.

In *Sutton* v. *United States,* 289 Fed. 488, it was held that the description " certain liquors," with the statement that a more particular description of which was unknown, was sufficient to support a warrant.

The generic description of intoxicating liquors, such as gin, wine, cordials, whiskey, brandies, was held sufficient in *Lipschutz* v. *Davis,* 288 Fed. 974.

In *Keefe* v. *Clark,* 287 Fed. 372, a seizure of 7,000 gallons of liquor was declared illegal where the warrant authorized a seizure of an aggregate amount not exceeding 450 gallons, but the court recognized that warrants may be issued for the seizure generally of intoxicating liquor.

The seizure in this case was of contraband liquors. Plaintiff in error had no property right in them. There was a reasonably specific description, and that is all that was required. *Giles* v. *United States, supra,* pp. 215–216.

II

Authority of Federal prohibition agents to receive and execute search warrants

Plaintiff in error challenges the validity of the search and seizure upon the grounds that the war-

rant was issued to and executed by a Federal prohibition agent; that such agents are appointed by the Commissioner of Internal Revenue; that they are therefore not civil "officers of the United States," within the meaning of that term as used in Article II, section 2, of the Constitution of the United States and section 6, Title XI, of the Espionage Act, as adopted by the National Prohibition Act, section 2, Title II, and are consequently not endowed with authority either to receive or to execute search warrants.

Plaintiff in error's theory is not supported by Federal statutes or the overwhelming weight of decisions upon the subject.

Congress has made the Commissioner of Internal Revenue, his assistants, agents, etc., primarily responsible for adequate enforcement of the National Prohibition Act (sec. 2, Title II). It has likewise vested that officer and his assistants with all the power and protection in the above work that is conferred by law for the enforcement of laws relating to the manufacture and sale of intoxicating liquor (sec. 28, Title II). In order further to strengthen his authority it has clothed him with power to designate any of his assistants to do any act that he himself is authorized to perform (sec. 1, subdiv. 7, Title II).

Federal prohibition agents, as field representatives of the Commissioner of Internal Revenue, must necessarily be delegates of the powers that he

possesses for enforcement of the Prohibition Act. Among such powers an important one is that of search and seizure, accomplished in most instances by means of the search warrant. As this instrument is the chief *modus operandi* of the agent, it would seem unreasonable for Congress to place him in the field but render him ineligible to receive or execute such a warrant.

Sufficient evidence of an intention on the part of Congress to regard prohibition agents as " officers of the United States," within the meaning of that term as found in the Constitution (Art. II, sec. 2), is contained in section 5, Title I, of the National Prohibition Act, where they are expressly referred to as members of that class.

The fact that the Prohibition Act (sec. 2, Title II) empowers agents to swear out warrants before United States Commissioners, etc., logically leads to the conclusion that Congress did not intend to invest a group of Government officers with power to swear out warrants and then bind their hands by rendering them ineligible to execute instruments of the same nature and of equal importance to the adequate performance of their duty.

The Act Supplemental to the National Prohibition Act (42 Stat. 222) clearly classes such agents with Government officers eligible to receive and execute search warrants when it imposes a penalty upon " any officer, agent, or employee of the United States " engaged in the enforcement of the Na-

tional Prohibition Act who shall search a private dwelling without a warrant directing such search, etc. (Sec. 6.)

In addition to the above statutes, section 23 of the Espionage Act provides, in substance, that nothing therein contained shall be construed to impair or repeal any existing provision of law regulating search and the issue of search warrants.

Attention is also invited in this connection to section 3462, R. S., which confers upon Judges of United States District Courts and upon United States Commissioners authority to issue a search warrant authorizing any Internal Revenue officer to search any premises within their respective jurisdiction. A prohibition agent, being a delegate of the Commissioner of Internal Revenue, would be a revenue officer within the meaning of the above section and therefore authorized to receive and execute search warrants.

This court has denied petitions for writs of certiorari in which this question was raised. (See Nos. 559 and 670, Oct. T. 1924.)

The Circuit Courts of Appeals for the First and Ninth Circuits have held that Federal prohibition agents are authorized to receive and execute search warrants.

Raine v. *United States*, 299 Fed. 407.
Keehn v. *United States*, 300 Fed. 493.

See also the following cases in the District Courts:

United States v. *Daison*, 288 Fed. 199.
United States v. *Keller*, 288 Fed. 204.
United States v. *Syrek*, 290 Fed. 820.
United States v. *O'Conner*, 294 Fed. 584.
United States v. *Edwards*, 296 Fed. 512.
United States v. *American Brewing Company*, 296 Fed. 772.
United States v. *Loeffelman et al.*, 297 Fed. 472.
United States v. *Montalbano*, 298 Fed. 667.
Smith v. *Gilliam*, 282 Fed. 628.

It is essential to the proper and efficient enforcement of the prohibition laws that decisions sustaining the right of Federal prohibition agents to execute search warrants be upheld.

CONCLUSION

It is submitted that the search warrant was valid and was properly executed by an officer authorized to receive and execute the same; that plaintiff in error was deprived of no constitutional rights by his conviction, and that the judgment and decree appealed from should be affirmed.

Respectfully,

JAMES M. BECK,
Solicitor General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
MAHLON D. KIEFER,
Special Assistant to the Attorney General.

FEBRUARY, 1925.

APPENDIX

For the convenience of the court, the following statutes are set forth below:

National Prohibition Act, Title II:

SEC. 2. The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United State commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of this act. Officers mentioned in said section 1014 are authorized to issue search warrants under the limitations provided in Title XI of the act approved June 15, 1917 (Fortieth Statutes at Large, page 217, et seq.)

SEC. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States, goes into effect, manufacture,

sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. * * *

SEC. 6. No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, * * *

SEC. 10. No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. * * *

SEC. 18. It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor.

SEC. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized

shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor and all property designed for the unlawful manufacture of liquor shall be destroyed unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term " private dwelling " shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. * * *

SEC. 33. After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this title. * * *

Act of June 15, 1917, Title XI, 40 Stat. 228 et seq., (Espionage Act):

SEC. 2. A search warrant may be issued under this title upon either of the following grounds: * * *

SEC. 3. A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

SEC. 4. The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require

their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

SEC. 5. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

SEC. 6. If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner.

SEC. 7. A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

SEC. 15. If the grounds on which the warrant was issued be controverted, the judge or commissioner must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and subscribed by each witness.

SEC. 16. If it appears that the property or paper taken is not the same as that described in the war-

rant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge or commissioner must cause it to be restored to the person from whom it was taken; but if it appears that the property or paper taken is the same as that described in the warrant and that there is probable cause for believing the existence of the grounds on which the warrant was issued, then the judge or commissioner shall order the same retained in the custody of the person seizing it or to be otherwise disposed of according to law.

○

STEELE *v.* UNITED STATES No. 1.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 235. Argued March 11, 1925.—Decided April 13, 1925.

1. Description, in a search warrant, of a building as a garage used for business purposes, giving its street and one of its two house numbers, *held* sufficiently definite, under the circumstances, for search of the whole building, which had three street entrances, and means of access between its parts on the ground and upper floors, and was used in conducting an automobile garage and storage business. P. 502.
2. A search warrant sufficiently describes the place to be searched if it enables the officer, with reasonable effort, to identify it. P. 503.
3. A warrant authorizing search of a building used as a garage, and any building or rooms connected or used in connection with the garage, *held* to justify search of the upper rooms connected with the garage by elevator. P. 503.
4. Search of rooms in a building used by a business *held* not unlawful under Prohibition Act § 25, because one of the rooms, not searched and in which no liquor was found, was slept and cooked in by an employee of the business. P. 503.

5. Description of articles to be searched for as "cases of whiskey" *held* sufficient. P. 504.
6. Where an experienced prohibition agent saw cases labeled "whiskey", which looked to him like whiskey cases, being unloaded at a building which, as he ascertained, had no permit to store whiskey, there was probable cause for warrant and seizure. P. 504.

Affirmed.

APPEAL from a judgment of the District Court refusing to vacate a search warrant, under which the appellant's premises were searched and quantities of whiskey, gin and alcohol were found and seized. See also the next case, *post*, p. 505.

Mr. Meyer Kraushaar, for appellant.

Solicitor General Beck, *Assistant Attorney General Willebrandt*, and *Mr. Mahlon D. Kiefer*, Special Assistant to the Attorney General, were on the brief for the United States.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is an appeal, under § 238 of the Judicial Code, direct from the District Court, being a case involving the application of the Federal Constitution. The judgment complained of denied a petition of Steele for an order vacating a search warrant, by authority of which Steele's premises were searched and a large amount of whiskey and other intoxicating liquor was found and seized. He contends that the search warrant violated the Fourth Amendment, because not issued upon probable cause, and not particularly describing the place to be searched or the property to be seized; and because the search conducted under the warrant was unreasonable. The affidavit for search warrant was as follows:

"Southern District of New York, ss:

"Isidor Einstein, being duly sworn, deposes and says: I am a General Prohibition Agent assigned to duty in

the State of New York. On December 6, 1922, at about 10 o'clock A. M., accompanied by Agent Moe W. Smith, I was standing in front of the garage located in the building at 611 West 46th Street, Borough of Manhattan, City and Southern District of New York. This building is used for business purposes only. I saw a small truck driven into the entrance of the garage and I saw the driver unload from the end of the truck a number of cases stencilled whiskey. They were the size and appearance of whiskey cases and I believe that they contained whiskey. A search of the records of the Federal Prohibition Director's office fails to disclose any permit for the manufacture, sale or possession of intoxicating liquors at the premises above referred to.

"The said premises are within the Southern District of New York and upon information and belief, have thereon a quantity of intoxicating liquor containing more than one-half of one per cent of alcohol by volume, and fit for use for beverage purposes, which is used, has been used and is intended for use in violation of the Statute of the United States, to wit, the National Prohibition Act.

"This affidavit is made to procure a search warrant, to search said building at the above address, any building or rooms connected or used in connection with said garage, the basement or sub-cellar beneath the same, and to seize all intoxicating liquors found therein.

"Isidor Einstein.

"Sworn to before me this 6th day of December, 1922. Saml. M. Hitchcock, U. S. Commissioner, Southern District of New York."

The search warrant issued by the Commissioner followed the affidavit in the description of the place and property to be searched and seized and was directed to Einstein as General Prohibition Agent.

Section 25, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315, provides for the issue of a search

warrant to seize liquor and its containers intended for use in violating the Act, and provides that the search warrant shall be issued as provided in Title XI of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 228.

Under that Title, in conformity with the Fourth Amendment, the warrant can be issued only upon probable cause, supported by affidavit, particularly describing the property and place to be searched. The judge or commissioner must before issuing the warrant examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist. If the judge or commissioner is satisfied of the existence of the grounds for the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner. If the grounds on which the warrant was issued be controverted, the judge or commissioner must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and subscribed by each witness. If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge or commissioner must cause the property to be restored to the person from whom it was taken; but if it appears that the

property taken is the same as that described in the warrant, and that there is probable cause for believing the existence of the grounds on which the warrant was issued, then the judge or commissioner shall order the same retained in the custody of the person seizing, or to be otherwise disposed of according to law.

The facts developed before the Commissioner on hearing this petition for return of the seized goods were these: Einstein and Moe Smith were prohibition agents. They saw a truck depositing cases in a garage on the opposite side of 46th Street from where they were. Einstein crossed the street and saw they were cases stenciled as whiskey. Einstein left his companion to remain in the neighborhood until he could get the warrant, and in somewhat more than an hour returned with it and made the seizure. The building searched was a four-story building in New York City on the south side of West 46th Street, with a sign on it: "Indian Head Auto Truck Service—Indian Head Storage Warehouse, No. 609 and 611." It was all under lease to Steele. It was entered by three entrances from the street, one on the 609 side, which is used, and which leads to a staircase running up to the four floors. On the 611 side there is another staircase of a similar character, which is closed, and in the middle of the building is an automobile entrance from the street into a garage, and opposite to the entrance on the south side is an elevator reaching to the four stories, of sufficient size to take up a Ford machine. There is no partition between 611 and 609 on the ground or garage floor, and there were only partial partitions above, and none which prevented access to the elevator on any floor from either the 609 or 611 side. The evidence left no doubt that, though the building had two numbers, the garage business covering the whole first floor and the storage business above were of such a character and so related to the elevator that there was no real

division in fact or in use of the building into separate halves. The places searched and in which the liquor was found were all rooms connected with the garage by the elevator. One of them was a room on the second floor with a door open toward the elevator, in which, when Einstein made his search, three men were bottling and corking whiskey. There was a room on one of the floors, flimsily boarded off, in which an employee had a cot and a cook stove. The prohibition agents seized 150 cases of whiskey, 92 bags of whiskey, and one 5-gallon can of alcohol, on the third floor on the 609 side. On the second floor, 33 cases of gin were seized on the 609 side and six 5-gallon jugs of whiskey, 33 cases of gin, 102 quarts of whiskey, and two 50-gallon barrels of whiskey, and a corking machine, were taken on the 611 side of the building.

The description of the building as a garage and for business purposes at 611 W. 46th Street clearly indicated the whole building as the place intended to be searched. It is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended. *Rothlisberger* v. *United States,* 289 Fed. 72; *United States* v. *Borkowski,* 268 Fed. 408, 411; *Commonwealth* v. *Dana,* 2 Metc. 329, 336; *Metcalf* v. *Weed,* 66 N. H. 176; *Rose* v. *State,* 171 Ind. 662; *McSherry* v. *Heimer,* 132 Minn. 260.

Nor did the search go too far. A warrant was applied for to search any building or rooms connected or used in connection with the garage, or the basement or sub-cellar beneath the same. It is quite evident that the elevator of the garage connected it with every floor and room in the building and was intended to be used with it.

The attempt to give the building the character of a dwelling house by reason of the fact that an employee slept and cooked in a room on one of the floors was of

course futile. Section 25 of the Prohibition Act forbids the search of any private dwelling unless it is used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel or boarding house. It provides that "private dwelling" is to be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel or boarding house. Certainly the room occupied in this case was not a private dwelling within these descriptions, but more than this, it was not searched and no liquor was found in it. *Forni* v. *United States*, 3 Fed. (2d) 354.

The search warrant properly described the building searched as a garage and one for business purposes.

Then it is said that the property seized was not sufficiently identified in the warrant. It was described as "cases of whiskey," and while there is no evidence specifically identifying the particular cases which were seized as those which Einstein saw, the description as "cases of whiskey" is quite specific enough. *Elrod* v. *Moss*, (C. C. A. 4th) 278 Fed. 123, 129; *Sutton* v. *United States*, 289 Fed. 488 (C. C. A. 5th); *Tynan* v. *United States*, 297 Fed. 177 (C. C. A. 9th); *Forni* v. *United States*, 3 Fed. (2d) 354 (C. C. A. 9th).

Finally it is said there was no probable cause for the warrant and the seizure. Einstein, a man of experience in such prosecutions and in such seizures, saw the name "whiskey" stenciled on cases and said they looked like whiskey cases. He ascertained by his own investigation of the official records that there was no permit for the legal storage of whiskey on these premises. In a recent case we have had occasion to lay down what is probable cause for a search. *Carroll* v. *United States*, 267 U. S. 132. "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in

believing that the offense has been committed, it is sufficient." What Einstein saw and ascertained was quite sufficient to warrant a man of prudence and caution and his experience in believing that the offense had been committed of possessing illegally whiskey and intoxicating liquor, and that it was in the building he described.

The search warrant fully complied with the statutory and constitutional requirements as set forth above, the liquor was lawfully seized and the District Court rightly held that it should not be returned.

The decree is affirmed.

Affirmed.

STEELE v. UNITED STATES No. 2.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 636. Argued March 11, 1925.—Decided April 13, 1925.

1. A judgment upholding a search warrant on a petition to vacate it is *res judicata* as to the competency of the person to whom the warrant was directed and as to probable cause for its issuance; so that the petitioner cannot subsequently raise the question in a criminal proceeding against him by objecting to evidence of seizure under the warrant. P. 507.
2. Section 6 of Title XI of the Espionage Act, adopted in the Prohibition Act (Title II, § 25), authorizes a search warrant to be issued "to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof"—*Held*, that this is not meant to be confined to officers of the United States in the limited Constitutional sense, but includes a general prohibition agent appointed by the Commissioner of Internal Revenue. P. 507.
3. In a prosecution for illegal possession of intoxicating liquor, in which the results of a seizure under a search warrant are offered against the defendant, the court, in deciding upon the competency of the evidence, determines whether under the facts and law there was probable cause for the warrant, and this question is not for the jury. P. 510.

Affirmed.

ERROR to a sentence under the National Prohibition Act. See also the case preceding, *ante*, p. 498.

Mr. Meyer Kraushaar, for plaintiff in error.

Solicitor General Beck, Assistant Attorney General Willebrandt, and *Mr. Mahlon D. Kiefer*, Special Assistant to the Attorney General, were on the brief for the United States.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a direct writ of error under § 238 of the Judicial Code to a conviction in the District Court of John F. Steele on an information in the District Court, for unlawfully, willfully and knowingly possessing a quantity of intoxicating liquor in violation of the National Prohibition Act. The prosecution grew out of the seizure of whiskey and gin upon a search warrant, at 611 West 46th Street, New York City, the validity of which we have had occasion to examine in the case just preceding. The question here is as to the competency of the evidence of seizure under the search warrant which we there found sufficient. In addition to the grounds urged in the last case, the validity of seizure is attacked because the search warrant was issued to a general prohibition agent, when under § 6 of Title XI of the Espionage Act of June 15, 1917, (c. 30, 40 Stat. 217, 228), such a warrant must be issued "to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof."

The argument is that the prohibition agent is appointed by the Commissioner of Internal Revenue, and therefore is only an employee and not a civil officer of the government in the constitutional sense, because such an officer under Article 2, Section 2 of the Constitution

can only be appointed either by the President and the Senate, the President alone, the courts of law or the heads of departments.

It should first be said that Steele is not in a position to raise this question. He might have raised it in the preceding case, but he did not do so, and did not assign error on account of it in his appeal to this Court. The refusal to vacate the search warrant and to return the liquor seized was a final decree. The question is therefore *res judicata* as against him.

But even if this were not so, we do not think the objection well taken. We think that the expression "civil officer of the United States duly authorized to enforce, or assist in enforcing, any law thereof," as used in the Espionage Act, does not mean an officer in the constitutional sense; that Congress in incorporating the provision in § 25, Title II, of the National Prohibition Act, did not so construe it and had no intention thus to limit persons authorized to receive and serve search warrants. It is quite true that the words "officer of the United States," when employed in the statutes of the United States, is to be taken usually to have the limited constitutional meaning. *Burnap* v. *United States,* 252 U. S. 512; *United States* v. *Mouat,* 124 U. S. 303; *United States* v. *Smith,* 124 U. S. 525. But we find that this Court in consideration of the context has sometimes given it an enlarged meaning and has found it to include others than those appointed by the President, heads of departments, and courts. *United States* v. *Hendee,* 124 U. S. 309. The emphasis of the words of description in the Espionage Act is really on the limitations that the person designated shall be a civil and not a military agent of the government and shall be one "duly authorized to enforce or assist in enforcing any law of the United States." It is not to be supposed that Congress wished to exclude from those empowered to receive and execute

search warrants persons usually called officers who are in their duties most widely employed to enforce or assist in enforcing laws. Thus deputy marshals of the United States are appointed by the United States marshal under whom they serve (§ 780, Revised Statutes), and he and his deputies have in each State the same power in executing the laws of the United States as the sheriffs and their deputies in such State in executing the laws thereof. The deputy marshal is not in the constitutional sense an officer of the United States, and yet marshals and deputy marshals are the persons chiefly charged with the enforcement of the peace of the United States, as that is embraced in the enforcement of federal law. *In re Neagle,* 135 U. S. 1, 68, 69. A deputy marshal is engaged in serving all sorts of writs and is called upon to exercise great responsibility and discretion in the service of some of them in dealing with the persons and property of individuals and in the preservation of their constitutional rights. The same thing may be said of deputy collectors of customs. Under § 2630, a collector of customs, with the approval of the Secretary of the Treasury, may employ within his district such number of proper persons as deputy collectors of customs as he shall deem necessary, and such deputies are declared to be officers of the customs, and the collector may exercise his powers and perform his duties by deputy. And one of the chief functions of the collectors of customs and of the deputy collector is the seizure of goods which have not paid a tax, as seen by Chapter 10 of Title 34 of the Revised Statutes. Deputy collectors of internal revenue are to be appointed by the Collector of Internal Revenue; § 3148 R. S. He may appoint as many as he thinks proper. Each deputy is to have the like authority which by law is vested in the collector himself, and distraint and seizure in the assessment and collection of taxes are authorized by Ch. 2, Title 35:

The National Prohibition Act in Title I, § 5, reads:

"The Commissioner of Internal Revenue, his assistants, agents, and inspectors, and *all other officers of the United States* whose duty it is to enforce criminal laws, shall have all the power for the enforcement of the War Prohibition Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the laws of the United States."

Title II, § 28, is:

"The Commissioner, his assistants, agents, and inspectors *and all other officers of the United States* whose duty it is to enforce criminal laws shall have all the power in the enforcement of this act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States."

Section 3462 of the Revised Statutes is one of the laws thus referred to in the foregoing sections, and provides:

"That the several judges of the circuit and district courts of the United States and commissioners of the circuit courts, may, within their respective jurisdictions, issue a search-warrant, authorizing any internal revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of said premises."

Again, Title II, § 1, of the Prohibition Act, reads:

"Any act authorized to be done by the commissioner may be performed by any assistant or agent designated by him for that purpose."

Again, Title II, § 26, reads:

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liq-

uors in any wagon, buggy, automobile, water or air craft or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law."

The foregoing would seem to indicate that lawful seizures were not to be confined to constitutional officers.

Again, in § 6 of the Act Supplemental to the National Prohibition Act, 42 Stat. 222, it is provided that any officer, agent or employee of the United States engaged in the enforcement of this Act or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, without a warrant directing such search, shall be guilty of a misdemeanor.

This justifies an inference that Congress expected searches to be made with search warrants by officers, agents or employees.

The question whether a prohibition agent has the power and right to serve a search warrant as provided in the Espionage Act, and § 25 of Title II of the National Prohibition Act, has led to some difference of opinion among the judges of the Circuit Courts of Appeals and also of the District Courts, but the weight of authority as indicated by the decisions is strongly in favor of the broader construction which vests the power and duty to receive and serve a search warrant in prohibition agents appointed by the Commissioner of Internal Revenue. *Raine* v. *United States*, 299 Fed. 407 (C. C. A. 9th); *Keehn* v. *United States*, 300 Fed. 493 (C. C. A. 1st); *United States* v. *American Brewing Co.*, 296 Fed. 772; *United States* v. *O'Connor*, 294 Fed. 584; *United States* v. *Syrek*, 290 Fed. 820; *United States* v. *Keller*, 288 Fed. 204.

The second question which is raised here by proper exception and assignment is whether the defendant had the right to have submitted to the jury the issue of fact

whether there was probable cause to issue the warrant, with direction that if the jury found that there was not probable cause, it should ignore the evidence resulting from the seizure and acquit the defendant. There are two answers to this assignment of error. One has already been referred to, that the fact of the existence of probable cause in the issue of the search warrant was *res judicata*, made so by the judgment of the court in the case preceding that the property could not be returned to Steele. The second answer is that the question of the competency of the evidence of the whiskey by reason of the legality or otherwise of its seizure was a question of fact and law for the court and not for the jury. *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94, 103; *Bartlett* v. *Smith*, 11 M. & W. 483; *Doe dem. Jenkins* v. *Davies*, 10 Ad. & El. N. S. 314; 5 Wigmore, Evidence (2d Ed.) § 2550.

The judgment of the District Court is affirmed.

Affirmed.